Supreme Court, U.S.
FILED

941558 MAR 20 1995

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FRANCIS W. PARKER SCHOOL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DREW S. DAYS, III
Solicitor General

PAUL BENDER
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JAMES R. NEELY, JR.
Deputy General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

GAIL S. COLEMAN
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, prohibits disparate impact discrimination.

2. If so, whether the ADEA prohibition against disparate impact discrimination protects applicants for employment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	6
Conclusion	15
Appendix A	1a
Appendix B	17a
Appendix C	19a
Appendix D	42a
Appendix E	44a
Appendix F	46a

TABLE OF AUTHORITIES

Cases:

Arnold v. *United States Postal Serv.*, 863 F.2d 994 (D.C. Cir. 1988), cert. denied, 493 U.S. 846 (1989)	8-9
Connecticut v. *Teal*, 457 U.S. 440 (1982)	10
County of Washington v. *Gunther*, 452 U.S. 161 (1981)	11
Dothard v. *Rawlinson*, 433 U.S. 321 (1977)	10
EEOC v. *Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984)	8
EEOC v. *Commercial Office Products Co.*, 486 U.S. 107 (1988)	12
EEOC v. *Local 350, Plumbers & Pipefitters*, 998 F.2d 641 (9th Cir. 1992)	9
Faulkner v. *Super Valu Stores, Inc.*, 3 F.3d 1419 (10th Cir. 1993)	8
Geller v. *Markham*, 635 F.2d 1027 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981)	8
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971)	7, 9
Hazen Paper Co. v. *Biggins*, 113 S. Ct. 1701 (1993)	4, 5, 7, 10, 11

Cases—Continued: Page

Holt v. *Gamewell Corp.*, 797 F.2d 36 (1st Cir. 1986) 8
Houghton v. *Sipco, Inc.*, 38 F.3d 953 (8th Cir. 1994) 9
Leftwich v. *Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983) 8
Lorillard v. *Pons*, 434 U.S. 575 (1978) 10
MacPherson v. *University of Montevallo*, 922 F.2d 766 (11th Cir. 1991) 8
Massarsky v. *General Motors Corp.*, 706 F.2d 111 (3d Cir.), cert. denied, 464 U.S. 937 (1983) 8
Oscar Mayer & Co. v. *Evans*, 441 U.S. 750 (1979) 10
Watson v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988) 9-10
Wooden v. *Board of Educ.*, 931 F.2d 376 (6th Cir. 1991).. 8

Statutes and regulations:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 2, 3
§ 4(a)(2), 29 U.S.C. 623(a)(2) 10, 12, 13
§ 4(f)(1), 29 U.S.C. 623(f)(1)..... 11
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 2, 5, 6, 9, 10, 11, 12, 13, 14
§ 703(a)(2), 42 U.S.C. 2000e-2(a)(2) (1970) 9, 10
§ 703(a)(2), 42 U.S.C. 2000e-2(a)(2) 12, 13
29 C.F.R.:
Section 860.103(f)(1)(i) (1969)..... 12
Section 860.103(f)(2) (1969)..... 12
Section 1625.7(d) (1994)..... 12

Miscellaneous:

118 Cong. Rec. 4943 (1972) 13

In the Supreme Court of the United States

OCTOBER TERM, 1994

No.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FRANCIS W. PARKER SCHOOL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 41 F.3d 1073. The opinion and orders of the district court (App., *infra*, 17a-18a, 19a-41a, 42a-43a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1994. A petition for rehearing was denied on November 18, 1994. App., *infra*, 44a-45a. By order dated February 9, 1995, Justice Stevens extended the time within which to file a petition for a writ of certiorari to

and including March 18, 1995 (a Saturday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, are reproduced in the Appendix, *infra*, 46a-48a.

STATEMENT

1. Francis W. Parker School (respondent) is a private K-12 school in Chicago, Illinois. App., *infra*, 19a. Respondent's collective bargaining agreement establishes a 22-step pay system for incumbent teachers. *Ibid.* Under that system, each year of additional experience as a teacher for respondent produces a corresponding increase in salary. *Ibid.* In 1989, for example, step one on the salary chart corresponded to a salary of $22,000, while step 22 on the salary chart corresponded to a salary of approximately $46,000. *Id.* at 19a-20a. Under the collective bargaining agreement, the principal has the discretion to determine the entry salary of all new teachers. *Id.* at 27a. After teachers have been hired, they then progress one step in salary each year. *Ibid.*

As a matter of practice, respondent determines the entry salary for new teachers based on their years of prior relevant experience. App., *infra*, 2a. For example, if the principal determines that a teacher has five years of relevant experience, the teacher would receive an entry salary that corresponds to step five on respondent's salary chart. Consistent with that policy, when respondent sets a salary cap for a teaching vacancy, it refuses to consider applicants whose experience level would require them to be paid above the cap. *Id.* at 20a-21a & n.1, 22a-23a, 25a. That practice of refusing to

consider experienced applicants for certain positions is the policy at issue in this case.

In the fall of 1988, one of respondent's drama teachers left the school and respondent began searching for a replacement. App., *infra*, 20a. For budgetary reasons, respondent decided that it could offer no more than $28,000 for that position. *Id.* at 20a-21a. Under respondent's salary system, teachers with more than six years of experience earn more than $28,000. *Id.* at 21a n.1. Respondent therefore limited its search for a new drama teacher to persons who had six years of relevant experience or less. *Id.* at 20a-21a & n.1.

Harold Johnson, who was 63 years old and had 30 years of teaching experience, applied for the vacancy. App., *infra*, 21a-22a & n.3. Respondent rejected Johnson's application. *Id.* at 22a-23a. Respondent told Johnson that he could not be hired because his experience level required that he receive a higher salary than respondent could afford to pay. *Ibid.* Respondent then hired a person in her 20s, who had approximately one year of relevant experience. *Id.* at 21a.

Petitioner Equal Employment Opportunity Commission (EEOC) filed suit against respondent alleging that its conduct violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* App., *infra*, 23a. The EEOC did not challenge respondent's right to set a salary cap for teaching vacancies. *Id.* at 32a. Rather, the EEOC challenged respondent's practice of precluding applicants, whose experience level would qualify them for a higher salary, from competing for vacancies at the salary dictated by the cap. *Ibid.* Relying on a disparate impact theory of discrimination, the EEOC asserted that this practice violated the ADEA because it arbitrarily screened out

persons 40 years of age and older at a much higher rate than persons under 40. *Id.* at 32a, 38a-39a.*

2. The district court initially refused to grant respondent's motion for summary judgment. App., *infra*, 19a-41a. The district court found that respondent's practice of precluding experienced teachers from competing for positions with salary caps when their experience level required a higher salary under respondent's salary system had a disproportionate impact on persons 40 years of age and older. *Id.* at 39a-41a. In addition, the court noted that respondent's summary judgment motion did not contain any evidence that it had a business justification for this practice. *Id.* at 38a. Accordingly, the court concluded that respondent was not entitled to summary judgment. *Id.* at 41a.

After this Court decided *Hazen Paper Co.* v. *Biggins*, 113 S. Ct. 1701 (1993), respondent sought reconsideration of its motion for summary judgment. The district court denied the motion, reasoning in part that "*Hazen* does not change the law concerning disparate impact analysis." App., *infra*, 43a.

Respondent then filed a new motion for summary judgment, and this time the district court granted it. App., *infra*, 17a-18a. The court reasoned that under *Hazen Paper*, evidence that a practice excludes a disproportionate percentage of workers 40 years of age and older "is not enough, standing alone, to support ADEA liability." *Id.* at 18a.

---

* The EEOC also alleged that respondent's conduct violated the ADEA under a disparate treatment theory of liability. App., *infra*, 24a. The district court granted summary judgment against the EEOC on that theory, and the EEOC did not appeal from that determination. *Id.* at 42a-43a. That theory of liability is therefore not at issue here.

3. A divided panel of the court of appeals affirmed. App., *infra*, 1a-16a. The majority concluded that *Hazen Paper* precludes the use of disparate impact theory under the ADEA. *Id.* at 5a-6a. Although the court of appeals acknowledged that *Hazen Paper* was a disparate treatment case, it concluded that the Court's analysis in that case was "instructive." *Id.* at 5a. Relying on the statement in *Hazen Paper* that disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA" (113 S. Ct. at 1706), the court of appeals held that "decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited." App., *infra*, 5a-6a.

The court concluded that this interpretation was supported by the ADEA's exception for differentiations based on "reasonable factors other than age." App., *infra*, 6a-7a. That exception, the court determined, "suggests that decisions which are made for reasons independent of age but which happen to correlate with age are not actionable under the ADEA." *Ibid.*

The court rejected the argument that because the language in the ADEA mirrors the language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and Title VII has been interpreted by this Court to prohibit disparate impact discrimination, the ADEA must prohibit disparate impact discrimination as well. App., *infra*, 7a-8a. The court reasoned that the statutory provision in Title VII that has been interpreted to prohibit disparate impact discrimination applies to applicants for employment, while the corresponding provision in the ADEA does not. *Ibid.*

The court of appeals then held that the EEOC was required to prove that respondent's practice of precluding teachers from competing for positions with

salary caps when their experience level required a higher salary under respondent's salary system was "predicated on some stereotype, conscious or unconscious." App., *infra*, 9a. Because the EEOC did not allege that this practice was "a subterfuge for the belief that older teachers are less effective than younger teachers," the court of appeals held that the district court had properly granted summary judgment in favor of respondent. *Ibid.*

Judge Cudahy dissented from the panel's decision. App., *infra*, 10a-16a. He agreed with the majority that *Hazen Paper* limits ADEA liability to decisions based on "misperceptions about the competence of older workers." *Id.* at 10a. He concluded, however, that disparate impact analysis is an appropriate method for determining whether an employment practice is based on age-related stereotypes. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals has held that the ADEA does not prohibit disparate impact discrimination. That holding conflicts with the holdings of three other circuits; it is inconsistent with this Court's interpretation of Title VII, upon which the ADEA was modelled; and it significantly narrows the scope of the protection afforded by the ADEA. The court of appeals also erred in holding that the ADEA does not prohibit disparate impact discrimination against applicants for employment. Review by this Court is therefore warranted.

1. This Court has recognized a distinction between disparate treatment and disparate impact theories of employment discrimination. Disparate treatment occurs when an employer treats some people less favorably than others because of a protected characteristic. When

disparate treatment is alleged, proof of discriminatory motive is required. *Hazen Paper*, 113 S. Ct. at 1705. In contrast, disparate impact discrimination occurs when an employment practice that is facially neutral affects one group more harshly than another and is not shown to be job-related. When disparate impact discrimination is alleged, proof of discriminatory motive is not required. *Ibid.*

Respondent's practice of refusing to permit experienced teachers to compete for positions with salary caps when their experience level would require them to be paid at a higher salary under respondent's salary system is an example of disparate impact discrimination. That practice, while facially neutral, has the effect of screening out persons 40 years of age and older at a much higher rate than persons under 40 years of age. App., *infra*, 38a-39a. The only justification respondent offers for that practice is its desire to limit the salary of the teachers that it hires to an amount within its budget. That interest can be fully served by setting a salary cap and then permitting persons of all experience levels to compete for the position at the salary dictated by the cap. Respondent's practice of refusing to consider applicants who are willing to work for the amount dictated by the cap simply because their experience level would require a higher salary under respondent's salary system therefore constitutes the very kind of arbitrary barrier to employment opportunity that the disparate impact theory of discrimination condemns. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971).

The court of appeals did not hold otherwise. Rather, it held that the ADEA simply does not prohibit disparate impact discrimination. The court specifically stated that the ADEA is violated only when the challenged practice

salary caps when their experience level required a higher salary under respondent's salary system was "predicated on some stereotype, conscious or unconscious." App., *infra*, 9a. Because the EEOC did not allege that this practice was "a subterfuge for the belief that older teachers are less effective than younger teachers," the court of appeals held that the district court had properly granted summary judgment in favor of respondent. *Ibid.*

Judge Cudahy dissented from the panel's decision. App., *infra*, 10a-16a. He agreed with the majority that *Hazen Paper* limits ADEA liability to decisions based on "misperceptions about the competence of older workers." *Id.* at 10a. He concluded, however, that disparate impact analysis is an appropriate method for determining whether an employment practice is based on age-related stereotypes. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals has held that the ADEA does not prohibit disparate impact discrimination. That holding conflicts with the holdings of three other circuits; it is inconsistent with this Court's interpretation of Title VII, upon which the ADEA was modelled; and it significantly narrows the scope of the protection afforded by the ADEA. The court of appeals also erred in holding that the ADEA does not prohibit disparate impact discrimination against applicants for employment. Review by this Court is therefore warranted.

1. This Court has recognized a distinction between disparate treatment and disparate impact theories of employment discrimination. Disparate treatment occurs when an employer treats some people less favorably than others because of a protected characteristic. When

disparate treatment is alleged, proof of discriminatory motive is required. *Hazen Paper*, 113 S. Ct. at 1705. In contrast, disparate impact discrimination occurs when an employment practice that is facially neutral affects one group more harshly than another and is not shown to be job-related. When disparate impact discrimination is alleged, proof of discriminatory motive is not required. *Ibid.*

Respondent's practice of refusing to permit experienced teachers to compete for positions with salary caps when their experience level would require them to be paid at a higher salary under respondent's salary system is an example of disparate impact discrimination. That practice, while facially neutral, has the effect of screening out persons 40 years of age and older at a much higher rate than persons under 40 years of age. App., *infra*, 38a-39a. The only justification respondent offers for that practice is its desire to limit the salary of the teachers that it hires to an amount within its budget. That interest can be fully served by setting a salary cap and then permitting persons of all experience levels to compete for the position at the salary dictated by the cap. Respondent's practice of refusing to consider applicants who are willing to work for the amount dictated by the cap simply because their experience level would require a higher salary under respondent's salary system therefore constitutes the very kind of arbitrary barrier to employment opportunity that the disparate impact theory of discrimination condemns. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971).

The court of appeals did not hold otherwise. Rather, it held that the ADEA simply does not prohibit disparate impact discrimination. The court specifically stated that the ADEA is violated only when the challenged practice

is "based on misperceptions about the competence of older workers" and that "decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited." App., *infra*, 6a. Because the EEOC had not alleged that the practice challenged in this case was "a subterfuge for the belief that older teachers are less effective than younger teachers," the court affirmed the district court's award of summary judgment against the EEOC. *Id.* at 9a.

2. The Seventh Circuit's decision in this case conflicts with decisions from the Second, Eighth, and Ninth Circuits. Those circuits have all squarely held that the ADEA prohibits disparate impact discrimination. *Geller* v. *Markham*, 635 F.2d 1027, 1032-1034 (2d Cir. 1980) (practice of limiting applicants to persons with less than five years of experience violates the ADEA), cert. denied, 451 U.S. 945 (1981); *Leftwich* v. *Harris-Stowe State College*, 702 F.2d 686, 690-692 (8th Cir. 1983) (practice of reserving positions for non-tenured faculty violates the ADEA); *EEOC* v. *Borden's, Inc.*, 724 F.2d 1390, 1394-1395 (9th Cir. 1984) (denial of severance pay to those eligible to retire violates the ADEA). While rejecting disparate impact claims based on the facts before them, the remaining circuits that have addressed the question have all assumed that the ADEA prohibits disparate impact discrimination. *Holt* v. *Gamewell Corp.*, 797 F.2d 36, 37 (1st Cir. 1986); *Massarsky* v. *General Motors Corp.*, 706 F.2d 111, 117 (3d Cir.), cert. denied, 464 U.S. 937 (1983); *Wooden* v. *Board of Educ.*, 931 F.2d 376, 379 (6th Cir. 1991); *Faulkner* v. *Super Valu Stores, Inc.*, 3 F.3d 1419, 1428 (10th Cir. 1993); *MacPherson* v. *University of Montevallo*, 922 F.2d 766, 770-771 (11th Cir. 1991); *Arnold* v. *United States Postal Serv.*, 863 F.2d 994, 998 (D.C. Cir. 1988), cert. denied, 493

U.S. 846 (1989). The Seventh Circuit is the only circuit to have held that the ADEA does not prohibit disparate impact discrimination.

The conflict in the circuits on this issue is unlikely to abate. The Seventh Circuit denied the EEOC's suggestion for rehearing en banc in this case. App., *infra*, 44a-45a. And while the Seventh Circuit has read *Hazen Paper* to preclude disparate impact analysis under the ADEA, the Eighth and Ninth Circuits have both continued to apply disparate impact analysis in post-*Hazen Paper* cases. *Houghton* v. *Sipco, Inc.*, 38 F.3d 953, 958-959 (8th Cir. 1994); *EEOC* v. *Local 350, Plumbers & Pipefitters*, 998 F.2d 641, 646, 648 n.2 (9th Cir. 1992). This Court should grant certiorari to resolve the conflict in the circuits created by the Seventh Circuit's decision in this case.

3. a. The availability of disparate impact analysis under the ADEA follows from a line of cases beginning with this Court's decision in *Griggs*. At issue in *Griggs* was the proper construction of Section 703(a)(2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(2) (1970). As originally enacted in 1964 (as well as at the time of the Court's decision in *Griggs* in 1971), Section 703(a)(2) made it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." See 401 U.S. at 426 n.1. In *Griggs*, the Court interpreted Section 703(a)(2) to prohibit practices that have a disparate impact on groups protected by Title VII and that are not shown to be job-related. 401 U.S. at 431-432. This Court has repeatedly reaffirmed that interpretation. *E.g.*, *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 986-

991 (1988); *Connecticut* v. *Teal*, 457 U.S. 440, 445-449 (1982); *Dothard* v. *Rawlinson*, 433 U.S. 321, 328-329 (1977).

Congress enacted the ADEA in 1967, three years after it enacted Title VII. Section 4(a)(2) of the ADEA, 29 U.S.C. 623(a)(2), contains language that is identical to the language in Section 703(a)(2) of Title VII that was construed in *Griggs*, except that the ADEA language substitutes age for the categories of discrimination prohibited by Section 703(a)(2). By adopting the same language that it had used in Title VII, Congress manifested its intent to extend to older workers the same protection against discrimination that it had extended to the groups protected by Title VII three years earlier. See *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979); *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978). Because that language has been authoritatively construed by this Court to reach disparate impact discrimination under Title VII, it should receive the same construction under the ADEA.

b. The court of appeals concluded that the ADEA does not prohibit disparate impact discrimination for two reasons. Neither is persuasive.

First, the court concluded that *Hazen Paper* effectively forecloses reliance on disparate impact theory. App., *infra*, 5a-6a. *Hazen Paper*, however, was a disparate treatment case. There, the Court unanimously held that a decision based on a factor that is empirically correlated with age, such as pension status, does not constitute disparate treatment under the ADEA. 113 S. Ct. at 1705. Because the plaintiff in *Hazen Paper* relied solely on a disparate treatment theory of liability, the Court did not address the question whether a decision based on a factor empirically correlated with age could be challenged under a disparate impact theory of liability. *Id.* at 1706.

The Court specifically stated that "we have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here." *Ibid.* (citation omitted); see also *id.* at 1710 (Kennedy, J., concurring) (joining the Court's opinion on the understanding that the Court had reserved the question whether disparate impact theory is available under the ADEA). The court of appeals' conclusion that *Hazen Paper* forecloses reliance on disparate impact theory under the ADEA is inconsistent with this Court's express reservation of that issue.

The court of appeals found it "instructive" (App., *infra*, 5a) that the Court stated in *Hazen Paper* that disparate treatment analysis "captures the essence of what Congress sought to prohibit in the ADEA." 113 S. Ct. at 1707. But that statement simply means that the prohibition of disparate treatment lies at the core of the ADEA. That statement does not answer or even address the question whether the ADEA also prohibits disparate impact discrimination.

The court of appeals also deemed it significant (App., *infra*, 6a-7a) that the ADEA exempts from its prohibitions actions that are based on "reasonable factors other than age." 29 U.S.C. 623(f)(1). In the court's view, that exception "suggests that decisions which are made for reasons independent of age but which happen to correlate with age are not actionable under the ADEA." App., *infra*, 6a-7a. Congress did not, however, create an exception for "any" factor other than age. See *County of Washington* v. *Gunther*, 452 U.S. 161, 169-171 (1981) (indicating that exception to Title VII for wage differentials based on a use of "any other factor other than sex" may preclude disparate impact analysis of gender-based compensation claims). Rather, it confined the exception to "reasonable" factors other than age. The

clear implication of that limitation is that decisions based on factors other than age are subject to challenge under a disparate impact theory when they are not "reasonable," *i.e.*, when they are not job-related within the meaning of *Griggs*.

The Department of Labor, the agency initially charged with enforcing the ADEA, reached precisely that conclusion in its first set of guidelines under that statute. Those guidelines provided that, to qualify as a "reasonable factor other than age," a neutral standard would have to be "reasonably necessary for the specific work to be performed" or "shown to have a valid relationship to job requirements." 29 C.F.R. 860.103(f)(1)(i) and (f)(2) (1969). When the EEOC assumed responsibility for enforcing the ADEA, it adopted the same view. 29 C.F.R. 1625.7(d) (1994). The court of appeals erred in departing from this longstanding interpretation of the "reasonable factors" exception adopted by the agencies charged with enforcing the Act. See *EEOC* v. *Commercial Office Products Co.*, 486 U.S. 107, 115 (1988).

4. The court of appeals also concluded that, even assuming Section 4(a)(2) of the ADEA prohibits disparate impact discrimination, that Section is inapplicable in this case. The court of appeals noted (App., *infra*, 7a-8a) that the present version of Section 703(a)(2) of Title VII makes it unlawful for an employer "to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee," 42 U.S.C. 2000e-2(a)(2) (emphasis added), while Section 4(a)(2) of the ADEA does not contain the italicized phrase. The court of appeals then reasoned that this difference in language indicates that Section 4(a)(2)

protects only incumbent employees. App., *infra*, 7a-8a. That reasoning is seriously flawed.

By its express terms, Section 4(a)(2) is not limited to protecting incumbent employees. Although Section 4(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his *employees*," the employer may not engage in such conduct "in any way which would deprive or tend to deprive any *individual* of employment opportunities." 29 U.S.C. 623(a)(2) (emphasis added). The use of the term "individual" rather than "employee" indicates that Section 4(a)(2) protects applicants for employment as well as incumbent employees. The present case illustrates one way in which the text of Section 4(a)(2) protects applicants for employment. Respondent "classif[ies] [its] employees" according to a pay scale that is based on experience, and that practice has had the effect of depriving an "individual" (*i.e.*, an applicant for employment) of an employment opportunity.

Congress's addition of the phrase "or applicants for employment" to Title VII does not detract from that conclusion. Congress added that phrase to Title VII in 1972 as part of a series of amendments to that Act. While Congress made several substantive changes to Title VII in 1972, the amendment to Section 703(a)(2) was technical in nature. As explained in the bill's Section-by-Section analysis, the sole purpose of the amendment was "*to make it clear* that discrimination against applicants for employment * * * is an unlawful employment practice." 118 Cong. Rec. 4943 (1972) (emphasis added). As Congress viewed it, the amendment was "merely * * * declaratory of present law." *Ibid.*

5. The court of appeals' construction of the ADEA significantly limits the scope of the protection afforded by that Act. While the protection against disparate treatment is of undeniable importance in fulfilling the

purposes of the ADEA, that protection alone is incomplete. When facially neutral practices serve as barriers to the employment of older workers and are maintained without a job-related justification, they can have economic and even psychological effects that may be indistinguishable from the effects of intentional discrimination. Congress believed that older workers, no less than those protected by Title VII, are in need of protection from such practices.

Since 1989, the EEOC has filed approximately 20 suits under the ADEA that have relied upon a disparate impact theory of liability. In those suits, the EEOC has challenged the following practices, among others: (1) refusing to consider for jobs those who have previously received a higher salary; (2) refusing to hire persons deemed overqualified; (3) restricting jobs to recent college graduates; (4) laying off persons who are eligible or nearly eligible to retire; and (5) denying job opportunities to those on pensions. Under the construction of the ADEA adopted by the Seventh Circuit, the EEOC would no longer be able to bring challenges of this kind. The unfortunate result would be to dilute significantly the protection against workplace discrimination afforded by the ADEA. This Court should grant review to settle the question whether older workers enjoy the same protection against discriminatory impacts as is applicable under Title VII.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

PAUL BENDER
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

JAMES R. NEELY, JR.
Deputy General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

GAIL S. COLEMAN
Attorney
Equal Employment Opportunity Commission

MARCH 1995

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 93-3395

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLANT

v.

FRANCIS W. PARKER SCHOOL, DEFENDANT-APPELLEE

Argued April 20, 1994

Decided Oct. 21, 1994

Rehearing and Suggestion for Rehearing
En Banc Denied Nov. 18, 1994 *

BEFORE: BAUER and CUDAHY, Circuit Judges, and
GRANT, District Judge. * *

BAUER, Circuit Judge.

The United States Equal Employment Opportunity Commission ("EEOC") brought an action against the Francis W. Parker School ("Parker") alleging that in

---

* The Honorable Joel M. Flaum and the Honorable Ilana D. Rovner took no part in the consideration of this petition.

** The Honorable Robert A. Grant, United States District Judge for the Northern District of Indiana, is sitting by designation.

its 1989 hiring of a drama teacher, the school violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. The district court granted summary judgment in favor of Parker. We affirm.

I.

Parker is a private primary and secondary school located in Chicago's Lincoln Park area. The principal of the school has ultimate authority as to decisions on hiring and firing of teachers. Incumbent teachers' salaries are determined by a twenty-two-step system which links salary to work experience. As a matter of policy, Parker has also used the step system to determine the salaries it will pay new teachers by crediting them for prior teaching experience they have had elsewhere.

When a teacher left Parker's drama department in the fall of 1988, Paul Druzinsky, the head of the department, was asked to search for a replacement. Because of fiscal constraints, Parker's principal, John Cotton, told Druzinsky that the position would pay an annual salary of no more than $28,000. The list of candidates was narrowed to three, all of whom were interviewed between March 14 and March 24 of 1989. On March 27, Parker hired Nancy Bishop as the school's new full-time drama teacher. Bishop had at the time a year of experience and was to start at an annual salary of $22,000.

In the meantime, on March 13, after Druzinsky had announced the three finalists for the position, one of Parker's music teachers asked Druzinsky if he would review the resume of a drama teacher named Harold Johnson. Johnson was sixty-three years old and claimed to have thirty years of experience. Druzinsky called Johnson a week later to inform him

that he would not be hired. One of the reasons given for the decision was that Johnson qualified for a salary higher than Parker could afford. Druzinsky claims that he also told Johnson that he was not considered for the position because Druzinsky had received Johnson's resume after the search process was over and the final candidates had been chosen. Johnson denies that Druzinsky ever mentioned this.

On Johnson's behalf, the EEOC filed this lawsuit alleging that Parker's conduct constituted disparate treatment and disparate impact in violation of the ADEA. Parker's first motion for summary judgment was denied on August 27, 1992. In light of the Supreme Court's decision in *Hazen Paper Co. v. Biggins*, — U.S. ——, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), Parker requested that the court reconsider its ruling. The court granted the request, and on June 14, 1993, granted Parker's motion for summary judgment on the EEOC's disparate treatment claim. Parker followed up with a motion for summary judgment on the EEOC's disparate impact claim, and again relying on *Hazen Paper*, the court granted this motion. The EEOC appeals only the decision on its claim of disparate impact.

II.

We review a decision granting summary judgment *de novo*. *Doe v. Allied Signal Inc.*, 925 F.2d 1007, 1008 (7th Cir. 1991). Summary judgment is appropriate when the record, viewed in a light most favorable to the nonmoving party, reveals that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

Drafters of the ADEA relied to a large extent on the language of Title VII of the Civil Rights Act of

1964. 42 U.S.C. § 2000e. As a result, "disparate treatment" and "disparate impact," terms traditionally used to describe theories of relief under Title VII have been incorporated into the ADEA lexicon. The theories can briefly be described as follows.

Disparate treatment occurs when an employee is treated less favorably simply because of race, color, sex, national origin, or in our case, age. This is the most obvious form of discrimination. To be successful on this type of claim, proof of discriminatory motive is critical. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977).

Disparate impact is the result of more subtle practices, which on their face are neutral in their treatment of different groups but which in fact fall more harshly on one group than another. No proof of discriminatory motive is necessary, but if the practice is found to be justified by business necessity, the claim will fail. The EEOC claims that due to the statistically significant relationship between age and work experience, by setting a low maximum salary limit, Parker excluded a disproportionate percentage of applicants over the age of forty from consideration for the teaching position.[1] Because no business justification was offered in defense of this policy, the EEOC concludes that Parker's process in hiring a new drama teacher violated the dictates of the ADEA.

We begin our analysis with a brief discussion of the Supreme Court's decision in *Hazen Paper*. Walter

---

[1] In the words of the EEOC's expert, Dr. Marc Bendick, Jr., "job applicants age 40 and older would be precluded from hiring at a rate 4.2 times the rate applicable to counterpart applicants aged less than 40."

Biggins, a sixty-two year old technical director for the Hazen Paper Company was fired from his position in 1986. Hazen Paper's pension liability vested after an employee completed ten years of service. Biggins's pension benefits would have vested had he worked a few more weeks. As an alternative to his release, Hazen Paper offered to retain Biggins as a consultant, a position which would not have allowed Biggins's pension benefits to vest. Biggins brought an ERISA and ADEA claim against Hazen Paper. The jury held in his favor on both counts, and the Court of Appeals affirmed both findings of liability. The Supreme Court granted certiorari to decide whether discharge of an employee motivated by the employer's desire to avoid the vesting of pension benefits is sufficient to state a disparate treatment claim under the ADEA. *Hazen Paper*, — U.S. at —, 113 S.Ct. at 1704. Because the evidence did not show that Hazen Paper's decision was based on Biggins's age, the Court held that his disparate treatment claim was deficient. *Id.* at ——, 113 S.Ct. at 1708.

Hazen Paper was, by its own terms, a disparate treatment case only. *Id.* at ——, 113 S.Ct. at 1706. Nevertheless, the Court's examination of the ADEA is instructive here. Critical to the Court's analysis was its belief that inaccurate stereotyping of the elderly was, "the essence of what Congress sought to prohibit in the ADEA." *Id.* The ADEA "requires the employer to ignore an employee's age . . . it does not specify further characteristics that an employer must also ignore." *Id.* at ——, 113 S.Ct. at 1707. Hence, when an employer denies a worker an employment opportunity based on the belief that older employees are less efficient or less productive, the ADEA provides the worker with a cause of action. On

the other hand, "[w]hen the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is." *Id.* at ——, 113 S.Ct. at 1706. Nevertheless, "[b]ecause age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age-based.'" *Id.* at ——, 113 S.Ct. at 1707.

Because the decision to fire Biggins was not based on misperceptions about the competence of older workers, Hazen Paper did not violate the ADEA. The Court's discussion makes clear that the ADEA prevents employers from using age as a criterion for employment decisions. On the other hand, decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited. *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1993).

Our reading of *Hazen Paper* and the ADEA is supported by subsection (f) which reads:

> It shall not be unlawful for an employer, employment agency or labor organization—
>
> > (1) to take any action otherwise prohibited under subsection [ ] (a), ... of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

29 U.S.C. § 623(f).

The exception for differentiation based on "reasonable factors other than age" is particularly noteworthy. It suggests that decisions which are made for reasons independent of age but which happen to correlate with age are not actionable under the ADEA. *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1993); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1220 (7th Cir. 1987) (Easterbrook, J., dissenting). A similar provision in the Equal Pay Act which permits discrepancies in wages paid to male and female workers for "factors other than sex," has been construed to preclude disparate impact claims. *County of Washington v. Gunther*, 452 U.S. 161, 170-71, 101 S.Ct. 2242, 2248-49, 68 L.Ed.2d 751 (1981). A sensible interpretation of this provision is that it is further evidence of the ADEA's focus on eliminating decisions made based on stereotypes about age.

Our dissenting colleague insists that the EEOC's claim can be reconciled with the Court's decision in *Hazen Paper*. In his view, disparate impact theory is designed to bring scrutiny on actions which, although not invidiously discriminatory, might perhaps be the product of unconscious or lingering stereotypes. In this case, however, this approach is of limited applicability.

Perhaps most problematic is Judge Cudahy's reliance on Title VII jurisprudence which, though not unprecedented, *see, e.g., Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983); *E.E.O.C. v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984), seems inappropriate on the facts of this case. He concludes that because Title VII's prohibitions mirror those of the ADEA and Title VII permits disparate impact

relief, "similar acceptance in ADEA cases" is required.

In the relevant statutory provisions, however, Title VII and the ADEA differ in a significant way. Subsection (2) of Title VII's prohibitions, which was the basis for the Supreme Court's holding in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) (holding that Title VII allows claims based on disparate impact), proscribes any actions by employers which "limit, segregate, or classify [their] employees or *applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2) (emphasis added). The "mirror" provision in the ADEA omits from its coverage, "applicants for employment."[2] In light of the ADEA's nearly verbatim adoption of Title VII language, the exclusion of job applicants from subsection (2) of the ADEA is noteworthy. Hence, while the dissent may find our decision creates a "practical difficulty," it is a result dictated by the statute itself.

---

[2] The ADEA provision reads in relevant part:

> It shall be unlawful for an employer—
>
> * * * * *
>
> (2) to limit, segregate, or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a).

Moreover, disparate impact theory does not relieve the EEOC of its obligation to prove the error of the employer's ways. Parker's policy of linking wages to experience is an economically defensible and reasonable means of determining salaries. This is borne out by the ADEA's "safe harbor" provision which permits an employer to "observe the terms of a bona fide seniority system ... which is not a subterfuge to evade the purposes of [the ADEA's prohibitions]." 29 U.S.C. § 623(f)(2). Though years of service may be age-correlative, *Hazen Paper* holds that "it is incorrect to say that a decision based on years of service is necessarily age-based," unless the plaintiff can demonstrate that the reason given was a pretext for a stereotype-based rationale. *Hazen Paper*, — U.S. at ——, 113 S.Ct. at 1707.

Ultimately, the EEOC must show that Parker's rationale is pretextual and that the salary system is predicated on some stereotype, conscious or unconscious. Otherwise, summary judgment in favor of Parker is proper. *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1126 (7th Cir. 1994). The EEOC has not alleged how Parker's salary system might be a subterfuge for the belief that older teachers are less effective than younger teachers. The EEOC contends only that Parker's system disproportionately affects older applicants. As the district court held, this statistical correlation alone is insufficient to sustain a finding of ADEA liability. For these reasons, the decision of the lower court granting summary judgment in favor of Parker is AFFIRMED.

CUDAHY, Circuit Judge, dissenting.

The majority affirms the district court's grant of summary judgment on the apparent theory that *Hazen Paper Co. v. Biggins*, — U.S. ——, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), precludes the use of the disparate impact theory of liability under the ADEA. The disparate impact theory as applied here would concern the school's employment policy in refusing to depart from its practice of raising salaries for years of experience even when an older and more experienced teacher is willing to work for less. Such a policy disproportionately burdens older workers. I say "apparent theory" because the majority stops ever so slightly short of announcing this conclusion with perfect clarity. But that is the unmistakable import of the majority approach.

The majority's analysis begins with the premise that the decision not to hire Johnson was not based on misperceptions about the competence of older workers. If this characterization is accurate, then the majority is correct in saying that *Hazen Paper* precludes ADEA liability. My difficulty with the majority's approach is that its analysis begins with its conclusion: that the decision to pass Johnson by had nothing to do with stereotypical views of older workers. But, as I understand the use of disparate impact analysis in the age discrimination context, one of its important purposes is to answer this very question. Hence, disparate impact analysis should be allowed to proceed to determine whether the refusal to hire did really arise from stereotypical views of older workers. Not to do so is to say that "over-qualified" (i.e. overage) music teachers need not apply.

I.

Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987), held that employers violate the ADEA when they make employment decisions based on factors that correlate with age in an obvious manner, like salary, the proximity of pension benefits' vesting or gray hair. The Supreme Court's recent opinion in *Hazen Paper*, — U.S. ——, 113 S.Ct. 1701, rejects part of that framework. *Hazen Paper* focuses the scrutiny of the ADEA on discrimination on the basis of age qua age. The ADEA's purpose under *Hazen Paper* is to prohibit discrimination against older workers "on the basis of inaccurate and stigmatizing stereotypes." *Id.* at ——, 113 S.Ct. at 1706. An "employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly." *Id.*

So where an employer is *in fact* motivated by a desire to reduce salaries, it is permissible to fire higher-paid older workers and replace them with younger ones who will work for less. And perhaps if the employer *actually* has an aversion to gray hair, she can make her employment decisions accordingly. But, even so, *Hazen Paper* does not spell the end of the ADEA. It remains unlawful to invoke pretextually an ostensibly neutral factor that tends to correlate with age, while actually laboring under forbidden "inaccurate and stigmatizing stereotypes." *Id.* at —— - ——, 113 S.Ct. at 1706-07 ("We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination." *Id.* at ——, 113 S.Ct. at 1707).

All of this tells us about the underlying theory of ADEA liability, not the method of proof. Even before *Hazen Paper* there was substantial disagreement about the permissibility of premising ADEA liability on a showing of disparate impact. *See Markham v. Geller*, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981) (Rehnquist, J., dissenting from denial of certiorari).[1] And while the three concurring justices in *Hazen Paper* believed that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA," — U.S. at ——, 113 S.Ct. at 1710 (Kennedy, J., concurring), there is no suggestion that *Hazen Paper* itself answers the question.[2]

---

[1] "The courts and the EEOC have indicated that the impact analysis of *Griggs v. Duke Power Co.* is applicable to the ADEA." Mack A. Player, *Employment Discrimination Law*, § 6.10, at 525 (1988). *See Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981); *Maresco v. Evans Chemetics*, 964 F.2d 106, 115 (2d Cir. 1992); *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820, 105 S.Ct. 92, 83 L.Ed.2d 38 (1984); *Abbott v. Federal Forge, Inc.*, 912 F.2d 867, 872 (6th Cir. 1990); *Wooden v. Board of Educ.*, 931 F.2d 376, 379 (6th Cir. 1991); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983); *EEOC v. Borden's Inc.*, 724 F.2d 1390 (9th Cir. 1984); *Shutt v. Sandoz Crop Protection Corp.*, 934 F.2d 186, 188 (9th Cir. 1991); *Allison v. Western Union Tel. Co.*, 680 F.2d 1318 (11th Cir. 1982); *Mac-Pherson v. University of Montevallo*, 922 F.2d 766, 770-71 (11th Cir. 1991).

[2] Commentators on the subject have also offered divergent views. *See* Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan.L.Rev. 837 (1982) (theory unavailable); Note, *Disparate Impact and the Age Discrimination in Employment Act*, 68 Minn.L.Rev. 1038 (1984) (theory available); Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment*

So the question presented by this appeal is whether a plaintiff may endeavor to prove that an employer discriminated on the basis of age *qua* age by implementing a particular employment practice that disproportionately burdens older workers.

II.

The answer to that question depends mostly on what one thinks are the purposes of disparate impact liability. Implicit in the majority's approach is the view that employers are held liable under a disparate impact theory even where the practice or policy they have implemented isn't *really* discriminatory. As I have indicated, the employment policy at issue in this case is the school's refusal to depart from its policy of escalating salaries in relation to years of experience, where an older and more experienced teacher is willing to work for less.

The majority says that "there is no allegation that Francis Parker's salary system is a subterfuge for its belief that older teachers are less effective than younger teachers." But it would not appear to me that such a conscious and invidious scheme would need to be alleged in order to state a claim under the ADEA.

The basic prohibition of the ADEA makes it unlawful to "discriminate against any individual ... because of such individual's age." ADEA § 4(a)(1), 29 U.S.C. § 623(a). This language mirrors the anti-discrimination provision of Title VII.[3] In the Title

---

Act, 42 Fla.L.Rev. 229 (1990) (purporting to offer "a more balanced approach").

[3] The majority takes issue with the suggested parallel between Title VII and the ADEA. As noted in footnotes 1 and 2, this parallel cannot be characterized as novel. Title VII's

VII context, the disparate impact method of proving "discrimination ... because of [membership in a protected class]" is well-established (codified, in fact, by the Civil Rights Act of 1991). *See Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

The *Griggs* disparate impact method recognizes that not all discrimination is apparent and overt. It is sometimes subtle and hidden. It is at times hidden even from the decisionmaker herself, reflecting perhaps subconscious predilections and stereotypes. *See* Charles Lawrence. The disparate impact method therefore requires employers to determine which of their employment practices and policies burden a protected class in a disproportionate way.

But such practices need not *necessarily* be abandoned. They are nonetheless permissible, despite their disparate impact, where they are supported by a "business necessity." The point of that defense is to rebut the inference of discrimination (even unconscious discrimination) that the disparate impact tends to demonstrate. If business necessity is shown, we can assume that the practice in question was

---

appeal as persuasive authority in ADEA cases is not altered by the fact that the present case deals with "applicants" for employment. Whether or not subsection (2) of the unlawful practices section excludes applicants for employment is not as self-evident as the majority maintains. 29 U.S.C. § 623(a)(2). *See Geller*, 635 F.2d 1027 (2d Cir. 1980) (recognizing a disparate impact claim under the ADEA for an applicant in a position parallel to that of Johnson). There is also a good argument for the availability of disparate impact analysis under subsection (1). 29 U.S.C. § 623(a)(1). *See Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1127 (7th Cir. 1987) (holding that plaintiff had stated a valid disparate impact claim under subsection (1) of Title VII's unlawful practices section, 42 U.S.C. § 2000-e-2).

established *because* of that necessity, not merely as a product of stereotyping.

Of course, in the equal protection context the requirements for proving discrimination are far stricter. There, *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), requires precisely the sort of smoking gun evidence of conscious discriminatory motive and purpose that *Griggs'* more layered approach obviates.[4] Today's majority essentially holds ADEA plaintiffs to a *Washington v. Davis* standard. I see no reason for such a departure.

III.

The majority offers two reasons for its result. The first comes from ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1). That provision provides an affirmative defense to employers for actions taken "where ... the differentiation is based on reasonable factors other than age." Judge Easterbrook, dissenting in *Metz*, suggested that this language precluded the availability of disparate impact liability in ADEA cases. *Metz*, 828 F.2d at 1212-13. And today's majority agrees.

But it seems to me that the disparate impact method already provides a defense for factors that are determined to be based on reasonable factors other than age—the business necessity defense. While as a general matter, it is true that we ought to interpret statutes to avoid rendering language superfluous, it

---

[4] An exception, however, is recognized for jury selection challenges. The "impact-inference" standard applicable in that setting, *see Casteneda v. Partida*, is functionally indistinguishable from the type of disparate impact analysis set out in *Griggs*.

seems clear to me that § 4(f)(1) simply codifies the business necessity defense. It does not preclude the availability of disparate impact liability.

The second reason the majority offers to support its conclusion is the Supreme Court's decision in *Hazen Paper*. But I believe that the disparate impact theory of liability is designed as a means to *detect* employment decisions that reflect "inaccurate and stigmatizing stereotypes," — U.S. at ——, 113 S.Ct. at 1706. This is precisely the determination that *Hazen Paper* says the ADEA is intended to outlaw. I do not believe its use is in any way incompatible with ADEA liability. The basic practical difficulty with the majority's result is that it provides an opportunity for employers to exclude older applicants from lower-level jobs simply by declaring the applicants "overage" (i.e. entitled to earn an excessive salary for the job they seek.).

APPENDIX B

MINUTE ORDER (July 22, 1993)

(EEOC v. Francis Parker School, 91 C 4674)

This Court previously granted summary judgment for defendant on plaintiff's disparate treatment claim based on the Supreme Court's recent decision in *Hazen Paper Co. v. Biggin*, 113 S. Ct. 1701 (1993). Defendant now moves for summary judgment arguing that plaintiff's disparate impact claim is inconsistent with the Court's reasoning in *Hazen*. I agree.

The holding in *Hazen* is limited to disparate treatment claims. Still, the Court's observations about the purpose of the Age Discrimination in Employment Act ("ADEA") are germane regardless of whether a suit is couched in terms of disparate treatment or disparate impact. According to the *Hazen* Court, Congress enacted the ADEA to combat discrimination against older workers "on the basis of inaccurate and stigmatizing stereotypes." *Id.* at 1706. The stereotype to which the Court referred is that "productivity and competence decline with old age." *Id.* "When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age . . ." *Id.*

There is no evidence that Parker's decision not to hire Johnson was in any way motivated by inaccurate and stigmatizing stereotypes about older workers. Under the EEOC's theory of the case, which is the same under both the disparate treatment and disparate impact analyses, Parker's decision was motivated by economic factors that correlate with age. According to plaintiff's expert, there is a statistically significant relationship between age and experience under Parker's salary step system: the

older the applicant the greater his years of experience. Consequently, when Parker sets a low maximum salary limit, a disproportionate percentage of applicants age 40 and older are excluded from consideration. *Hazen* teaches that this kind of empirical correlation is not enough, standing alone, to support ADEA liability.

Since Parker's decision was motivated wholly by factors other than age, defendant is entitled to summary judgment under the Court's reasoning in *Hazen*. The ADEA simply does not prohibit employers from making hiring decisions that are wholly motivated by budgetary constraints, as was the decision in this case.

Defendant's motion for summary judgment is granted. In reaching this decision, the Court does not reach the broader question of whether the disparate impact theory is fundamentally incompatible with ADEA liability. Rather, I hold only that on the specific facts of this case, plaintiff's disparate impact claim is not viable.

APPENDIX C

U.S. DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

FRANCIS W. PARKER SCHOOL

No. 91 C 4674

March 23, 1993

JAMES B. ZAGEL, District Judge:—The United States Equal Employment Opportunity Commission ("EEOC") brought this action alleging age discrimination by the Francis W. Parker School in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. Parker now moves for summary judgment in its favor. For the reasons stated in this memorandum opinion and order, Parker's motion is denied.

FACTS

Parker is a private school for children from grades kindergarten through high school. The school was founded in 1901 and is located in Chicago. Parker's contractual relationship with its teachers is embodied in a Collective Bargaining Agreement between Parker's board of trustees and the school's faculty association. Under Parker's faculty contract, teacher salaries correspond to years of experience. The contract sets forth a 22-step system for setting teacher salaries. Each step represents one year of relevant experience and corresponds to a particular salary. In 1989, a Parker teacher with one year of experience (step 1 on the salary chart) was paid

roughly $22,000 annually; a teacher with 22 years of experience or more (step 22) received about $46,000.

Like most schools, Parker operates under an annual budget. In the fall of each school year preparation begins for the following school year's budget. Parker's business manager meets weekly with the school principal in preparing the budget. By February, the budget is usually ready for presentation to the board of trustees. Once the board approves a budget, tuition is set for the following school year. After the budget is set and tuition is announced, the principal, who makes the ultimate decisions about hiring teachers at Parker, is expected to make those decisions in conformity with the budget. Inevitably, the budget places restrictions on the amount of money the school can spend on teachers' salaries.

Early in the 1988-89 school year the head of Parker's drama department left the school. Paul Druzinsky, a full-time drama teacher, was appointed as department head, and two part-time teachers were appointed to fill the full-time vacancy on a temporary basis. Druzinsky began to search for a full-time replacement to fill the vacancy for the 1989-90 school year. Druzinsky prepared a job description for the position, posted a notice of the vacancy in the faculty room and asked the administration to contact teacher placement agencies. In response, Druzinsky received 15-30 resumes. After reviewing the resumes and interviewing about a half dozen candidates, Druzinsky narrowed the pool of applicants to three finalists.

Besides the requirements of the job description, the process of narrowing the pool of applicants was shaped by a salary limit. Based on a conversation in the fall of 1988 with Parker's Principal, John Cotton, Druzinsky understood that the job was to pay no

more than $28,000.[1] That figure, arrived at through computations made by Cotton and Parker's business manager, represented what the school could afford to pay whomever it hired to fill the drama department vacancy.

The initial screening process conducted by Druzinsky took place between November 1988 and February 1989. In late February or early March, Druzinsky submitted a list of three finalists to Principal Cotton. Cotton approved the list and Druzinsky immediately contacted the three finalists to arrange a final round of interviews. The school interviewed the three final candidates between March 14 and March 24. After a meeting on March 27, 1989, attended by Principal Cotton, Druzinsky and other individuals who participated in the interview process, Cotton selected Nancy Bishop as the top candidate to fill the vacancy. That same day, Bishop accepted the school's job offer. Having about a year of relevant experience, Bishop's starting salary was approximately $22,000.[2]

Meanwhile on March 13, 1989, the day before the school interviewed the first of the three final candidates, Lucius Bell, a teacher in Parker's music department, made inquiries with Druzinsky about the drama department vacancy. Although Druzinsky had posted a notice of the vacancy in the faculty room, Bell did not learn about the opening until Druzinsky posted a list of the three finalists. Bell told Druzinsky that an acquaintance of his, Harold Johnson, would be interested in applying for the

---

[1] In effect, this budgetary constraint meant that the school could only offer an entry level salary within the first six steps of the salary chart. Under the 1989-90 faculty contract, step one paid $22,164 a year, while step six paid $27,924.

[2] Although the parties have not mentioned Bishop's age in their submissions, it appears from the record that Bishop was in her late 20s in 1989.

position and asked Druzinsky if he would look at Johnson's resume. Druzinsky agreed to review Johnson's resume and Johnson, who was 63 years old at the time, submitted his resume that same day.

About a week later Johnson and Druzinsky spoke on the telephone. Druzinsky informed Johnson that he would not be offered the job. The parties are not in agreement about what was said during this conversation. Although Johnson does not recall it, Druzinsky says he told Johnson that one reason the school would not offer him the job was because Johnson had submitted his resume after the search process had closed. Johnson claims that Druzinsky told him he was over qualified for the position, a statement Druzinsky does not remember making. Both parties agree, however, that Druzinsky said Johnson would not be offered the job because, based on his resume, Johnson appeared to qualify for too high a salary given what Parker could afford to pay.[3]

Although he did not explain this to Johnson during their telephone conversation, Druzinsky testified at his deposition that he also rejected Johnson because he had problems with Johnson's resume. Specifically, Druzinsky testified that the resume reflected an emphasis on professional acting and directing rather than teaching, which Druzinsky found incompatible with the job requirements. Plaintiff denies that Druzinsky did not hire Johnson because of the content of his resume.

The parties agree that at the end of their telephone conversation, Druzinsky suggested that Johnson call Principal Cotton if he wanted further explanation about the school's decision. Cotton's diary indicates that he spoke to Johnson on March 28 and March 31 of

---

[3] The words "30 years experience" appeared at the top of Johnson's resume. This led Druzinsky to conclude that Johnson's level of experience would command a salary beyond the $28,000 limit set by Cotton.

1989. Cotton testified at his deposition that during these conversations he told Johnson that Parker "could not afford him." Cotton also recalls that Johnson expressed a willingness to work for less than Parker's salary scale would dictate. Cotton told Johnson he could not hire him at a salary level lower than his years of experience would dictate under the school's salary chart.

Johnson filed a charge of discrimination with the EEOC in April 1989. On August 29, 1990, the EEOC issued its determination that age discrimination had occurred. The final sentence of the EEOC's decision states: "A representative of this office will contact [Parker] in the near future to arrange a conciliation meeting." Between early September and late November, at the EEOC's initiation, the parties traded phone messages and correspondence in an effort to schedule a conciliation conference. The parties held a conciliation conference on December 27, 1990 at which the EEOC made an offer of settlement. Parker representatives said they would respond to the offer by February 1, 1991. On January 31, 1991, Parker's attorney called the EEOC and made a counter-offer. There is no evidence of further contact between the parties until the EEOC issued to Parker a Notice of Conciliation Failure on July 23, 1991. Two days later, the EEOC initiated this lawsuit.

SUMMARY JUDGMENT STANDARDS

Rule 56(c) provides that summary judgment should be granted only when the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether a genuine issue of material fact exists, the court must draw all reasonable inferences in the light most favorable to the party opposing the motion. *Bank Leumi LeIsrael, B.M. v. Lee*, 928 F.2d 232, 236

(7th Cir. 1991). A dispute about a material fact is "genuine" if the movant can point to some evidence in the record sufficient to suggest that a reasonable jury might adopt its view of the issue. *Anderson v. Liberty Lobby, Inc.*, [477 U.S. 242], 106 S.Ct. 2505, 2510 (1986). To show that a disputed fact is "material" the moving party must demonstrate that the fact is "outcome-determinative under applicable law." *Pritchard v. Rainfair, Inc.*, 945 F.2d 185, 191 (7th Cir. 1991). The applicable substantive law here is the ADEA. Thus, a brief discussion of the rules of decision under the ADEA is in order.

ADEA STANDARDS

The ADEA makes it unlawful for an employer "to fail or refuse to hire ... or otherwise discriminate against any individual ... because of such individual's age." 29 U.S.C. §623(a).[4] A plaintiff suing under the ADEA bears the ultimate burden of proving "that he was discharged because of his age." *Oxman v. WLS-TV*, 846 F.2d 448, 452 [46 FEP Cases 1392] (7th Cir. 1988). The plaintiff need not prove that age was the sole factor motivating the employer's decision, but rather, that "age was a 'determining' factor, in that plaintiff would not have been discharged *but for* his age." *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1364 [48 FEP Cases 1218] (7th Cir. 1988) (emphasis in original) (citation omitted).

DISCUSSION

Although it employs two separate methodologies to prove its case—disparate treatment and disparate impact—the theory of the EEOC's case remains constant. The EEOC contends that age discrimination is an inevitable byproduct of the way Parker

---

[4] The statute protects "individuals who are at least 40 years of age ..." 29 U.S.C. §631(a). Parker is an "employer" within the meaning of the ADEA. 29 U.S.C. §630(b).

implements its salary step system. The step system ties salary level to years of experience—the greater the years of experience the higher the salary. Couple this with Parker's refusal to allow older job applicants, like Johnson, to work for less than the salary level corresponding to their years of experience. The result, according to plaintiff, is an institutionalized bias against older job applicants. Older applicants are almost always more experienced than their younger counterparts and therefore command a salary that is more likely to exceed whatever salary limit the school has set. In effect, so the theory goes, older applicants are penalized for their age in violation of the ADEA.

Obviously, Parker does not think plaintiff's theory is grounded in reality. On the contrary, Parker asserts that the record before the Court entitles the school to a judgment in its favor as a matter of law. Parker argues that plaintiff's ADEA claim is time-barred and that the school's salary step system qualifies as a seniority system exempt from attack under the ADEA. Additionally, Parker contends that whether the case is examined under a disparate treatment or disparate impact analysis, plaintiff has failed to establish a genuine issue for trial.

1. Statute of Limitation

Parker argues that the EEOC's age discrimination action is barred by the statute of limitations. The EEOC has two years from the time the cause of action accrued in which to file suit for a non-willful violation of the ADEA. 29 U.S.C. §255(a) (1985). The two-year statute of limitations can be tolled for up to one year during conciliation efforts by the EEOC. 29 U.S.C. §626(e) (2) (1985). In other words, the period of conciliation extends the limitations period for up to one year.

At the earliest, this action accrued on March 20, 1989. On that date, Druzinsky told Johnson that

Parker would not hire him. The statutory period was tolled on August 29, 1990 when the EEOC stated in its "Determination" that it would contact the school in the near future to arrange a conciliation conference.[5] The tolling period continued until at least January 31, 1991, which is the date Parker made a counter-offer to settle the dispute. Therefore, at a minimum, the period of conciliation lasted for 155 days and extended the limitations period to two years and 155 days. Defendant correctly notes that this action was filed on July 25, 1991, two years and 126 days after accrual.

The EEOC filed this suit within the time period allowed. Parker's motion for summary judgment on statute of limitations grounds is denied.

2. Bona Fide Seniority System

An employer is not subject to liability under the ADEA for acts in conformity with the terms of a bona fide seniority system. Section 623(f)(2) provides: "It shall not be unlawful for an employer ... to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter ..." 29 U.S.C. §623(f)(2). The plain language of §623(f)(2) requires that before an employer can gain the protection of this safe harbor provision, the employer

---

[5] Arguably, the limitations period did not cease to run until the EEOC took the affirmative step of contacting the school to schedule a conciliation conference. Under either scenario, this action is timely filed. The Court rejects Parker's unsupported assertion that conciliation efforts did not commence until mid-October of 1990 when Cotton got a letter from the EEOC inviting Parker to conciliate the matter. The EEOC sent the letter only after its repeated attempts since early September to contact Cotton by telephone had failed. The phone calls the EEOC made to arrange a conciliation conference qualify as an "attempt[ ] to effect voluntary compliance ... through informal methods," 29 U.S.C. §626(e)(2), and thus tolled the limitations period.

must satisfy two criteria. First, the employer must "observe the terms" of a seniority system. Second, the employer must demonstrate that the system it follows qualifies as a "bona fide seniority system" within the meaning of the ADEA. Parker contends that its salary step system qualifies as a bona fide seniority system insulated from the operation of the ADEA. This assertion leapfrogs step one of the analysis, which asks whether Parker observed the terms of its purported seniority system in making the employment decision at issue in this case. For if Parker failed to follow the terms of its step system, §623(f)(2) is inapplicable and the question of whether the system is a bona fide seniority system is academic. The terms of Parker's salary step system are contained in the Collective Bargaining Agreement between Parker and the Francis Parker Faculty Association. The Agreement states:

> The 1989-1990 salary chart, Appendix C, provides the exclusive salary levels, based upon experience. *The principal shall have the discretion to determine the salary entry level of all new faculty members* and, thereafter, they shall move in progression as otherwise provided for herein. (Emphasis supplied).

The terms of the Agreement state unequivocally that Parker's principal is not bound by the experience-based salary chart in setting entry level salaries for new hires. The salary chart controls the "progression" of incumbent teachers' salaries but not "entry level" salaries of new faculty members.[6]

---

[6] Even the faculty association concedes that the principal is not bound by the salary chart under the circumstances presented in this case. In an August 1992 letter to the EEOC, the association interpreted the quoted provision of the Collective Bargaining Agreement to mean:

Parker did not "observe the terms" of its salary step system in this case. Johnson told Principal Cotton he was willing to work for less than the amount dictated by Parker's salary chart. Cotton, believing the faculty contract required that Johnson receive a salary corresponding to his years of experience, refused to consider hiring Johnson at a lower salary level. Cotton may well have believed, in good faith, that he could not deviate from the salary chart in setting entry level salaries. But the terms of Parker's step system are governed by the faculty contract not Cotton's understanding of the contract. In sum, Parker's conduct here conflicts with the terms of the contract hence §623(f)(2) can provide no shelter for the school.

3. Disparate Treatment

Simply put, disparate treatment occurs when an employer treats some people less favorably than others for a reason that the law does not permit, such as discrimination based on an individual's age. Proof of discriminatory motive is critical when disparate treatment in violation of the ADEA is alleged. *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1204 [44 FEP Cases 1339] (7th Cir. 1987).[7] A plaintiff can show that a defendant acted with a discriminatory motive by direct or indirect means. It is a rare case, however, when a plaintiff can produce the "smoking gun" that

---

bargaining agreement does not prohibit the principal from hiring an applicant age 40 or older at that capped salary level even if the applicant's years of experience would, absent a cap, have resulted in his or her placement at a higher level on the salary schedule. (Emphasis in original).

[7] Just as it is critical in disparate treatment cases brought under Title VII in which a plaintiff alleges discrimination by an employer based on race, color, religion, sex or national origin. *Int'l Brotherhood of Teamsters v. United States*, [431 U.S. 324], 97 S.Ct. 1843, 1854 n.15, [14 FEP Cases 1514] (1977).

a defendant acted with a discriminatory motive by direct or indirect means. It is a rare case, however, when a plaintiff can produce the "smoking gun" that proves age discrimination by direct evidence. Few employers write memos, for example, which state that a particular individual was fired or not hired because he or she was "too old." For that reason, plaintiffs are usually forced to prove age discrimination through indirect evidence, which calls into play a variation of the burden-shifting analysis used to resolve Title VII cases. *Id.* (*citing McDonnell Douglas Corp. v. Green*, [411 U.S. 792], 93 S.Ct. 1817 [5 FEP Cases 965] (1973)).

In the context of an ADEA claim, the burden-shifting analysis requires a plaintiff to prove that he

> 1) belongs to the protected class (age forty or older); 2) was qualified for [the] position; 3) was terminated; and 4) was replaced by a younger person. After the plaintiff has established a prima facie case, the defendant employer then has the burden of presenting evidence that the plaintiff's discharge was a result of 'some legitimate, nondiscriminatory reason.' If defendant meets this burden of production, the burden shifts to the plaintiff to prove that the reasons proffered by the employer for the discharge were merely a pretext for discrimination.

Id. Although the burden of production swings back and forth, the burden always "remains with the plaintiff to prove there was discrimination, rather than with the employer to prove the absence of discrimination." *Id.*

Plaintiff has established a prima facie case of age discrimination under a disparate treatment theory. Johnson, age 63 in 1989, qualifies as a member of the protected class. Although Druzinsky says he had reservations about Johnson's resume, Parker no

where takes the position that Johnson was not qualified for the job. Johnson was not hired by Parker and a younger person was hired instead.[8]

Parker contends it had two legitimate, nondiscriminatory reasons for not hiring Johnson. First, Parker asserts that the search process to fill the vacancy in its drama department had closed by the time Johnson submitted his resume. When Johnson delivered his resume on March 13, 1989, the school had already spent about three months looking for someone to fill the vacancy. Parker had narrowed its original pool of 15-30 applicants to three final candidates before Druzinsky ever heard of Johnson. On the other hand, Parker had not yet settled on a particular candidate when Johnson's name surfaced. At the time Druzinsky received Johnson's resume, Parker had not held its second round of interviews with the three finalists. Finally, and most significantly, Druzinsky agreed to look at Johnson's resume.

If the search process was closed, why did Druzinsky agree to review Johnson's resume in response to his colleague's inquiry about the vacancy? Druzinsky says he agreed to consider the resume as a "professional courtesy" to Mr. Bell.[9] The Court finds

---

[8] In its brief in support of this motion, Parker does not contest any of the elements of plaintiff's prima facie case. Defendant merely recites the prima facie requirements for disparate treatment, and then goes on to argue that it had nondiscriminatory reasons for not hiring Johnson. Def. Br. at 3.

[9] Druzinsky testified during his deposition:

Q. In your prior conversation with Mr. Bell, did you tell him that you would consider the person he was recommending even though you had already identified a list of three finalists?

A. No, I didn't tell him that. I said I would look at his resume.

Druzinsky's testimony contradictory. A trier of fact could reasonably doubt that Druzinsky agreed, in the name of "professional courtesy," to review a resume knowing all the while that the position for which the resume was submitted is no longer open. Furthermore, although Druzinsky testified he told Johnson that he had submitted his resume too late, Johnson claims Druzinsky never made such a remark. In fact, Johnson says that during a telephone conversation on March 13, Druzinsky told him he would hold the position open if Johnson submitted his resume that same day, which he did. Principal Cotton, the only other person who spoke with Johnson about his application, said nothing about his resume arriving after the search process had closed.

Despite Parker's insistence, it is unclear whether the school's review of Johnson's application was just a perfunctory exercise. A genuine factual dispute exists as to whether Parker's search process was closed when Johnson applied for the position. This dispute is material to whether Parker had a nondiscriminatory reason for not hiring Johnson. It is a question a jury should decide.

Next, Parker asserts that it had a budgetary reason for not pursuing Johnson. From Parker's viewpoint, Johnson's many years of experience doomed his candidacy because its step system required that Johnson receive considerably more than the $28,000 salary the school had budgeted for the vacancy. Moreover, under Principal Cotton's conception of the step system, the school could not offer Johnson the job even if he expressed a willingness to accept a salary at the budgeted limit.

Q. Did you tell him that his friend Mr. Johnson would not be considered because you had already reached a list of three finalists?

A. No, I looked at Mr. Johnson's resume as a pure professional courtesy.

The EEOC says Parker's fiscally-based explanation is not a legitimate, nondiscriminatory reason for refusing to pursue Johnson. In its brief, the EEOC acknowledges that Parker has a legitimate need to limit salary expenses, and does not contend that Parker should pay older applicants a higher salary. The EEOC argues, however, that Parker must allow an older applicant, like Johnson, to work within the salary limit even if it is less than the salary corresponding to their years of experience on Parker's salary chart. Otherwise, plaintiff concludes, Parker's salary step system proceeds on a collision course with the ADEA by screening out a disproportionately high percentage of older applicants.

The Seventh Circuit's decision in *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 [44 FEP Cases 1339] (7th Cir. 1987) provides some support for plaintiff's position. There, the court held that salary savings that could be realized by replacing an older employee with a younger, lower-paid employee did not qualify as a permissible, nondiscriminatory reason for the replacement. *Metz*, 828 F.2d at 1211. In explaining why salary savings did not constitute a nondiscriminatory justification, the court emphasized that the employer "did not pursue obvious less-detrimental alternatives to replacing Metz, such as offering Metz continued employment at a lower salary or in a different position." *Id.* at 1208. Implicit in the court's reasoning is that had the employer offered Metz the opportunity to work on the same terms as the younger employee, the employer would have been in a better position to show that its replacement decision was a cost-cutting measure and not a pretext for age discrimination. *Id.*; *Abbott v. Federal Forge, Inc.*, 912 F.2d 867, 876 [53 FEP Cases 1382] (6th Cir. 1990) (discussing *Metz*).

Parker asserts that applying the logic of *Metz* here creates a danger that the *Metz* court did not have to

contemplate. Parker says the court's suggestion that the employer could reduce the employee's salary rather than replace him "was based upon [Metz's] lessened productivity ..." Def. Reply Br. at 7. Metz's lower productivity, argues Parker, provided a defense to an ADEA action that Parker would be without if it hired someone like Johnson to work at the same salary level as younger, less experienced teachers. The trouble with this argument is that the employer's decision in *Metz* was not motivated by productivity concerns but by "a desire to save the higher cost of Metz's salary ..." *Metz*[,] 828 F.2d at 1204. The *Metz* court did not even discuss the productivity of Metz or his younger replacement.[10] Thus, once the false distinction regarding "productivity" is wiped away, it is evident that the Seventh Circuit did not perceive a risk of future ADEA liability as a likely outgrowth of the employer's pursuit of "less-detrimental alternatives." Probably, the court realized that as long as an employer's budget constraints are real, paying an older employee at a salary consistent with those constraints is not violative of the ADEA.

Parker also attempts to distinguish *Metz* on two additional grounds. First, Parker argues that the holding in *Metz* relates to situations in which an older employee is replaced by a younger worker. The

---

[10] The district court found that the plant closing which led Transit Mix to discharge Metz was caused by "the decline in the local construction business." *Id.* at 1203. The president of Transit Mix testified at trial: "I really can't say that I pointed a finger of blame at Mr. Metz for business being as it was. But, that the area—the Knox area business was bad, it was very poor and it was getting worse and worse and worse." *Id.* at 1203 n.4. Besides their relative salaries, the only difference between the two workers cited by Transit Mix was that the younger man could more easily "return to the Plymouth plant [if] the Knox satellite plant did not improve." *Id.* at 1205 n.5.

Court agrees, but that does not invalidate the court's reasoning in *Metz* as a source of guidance in cases involving hiring decisions. The ADEA itself draws no distinction between hiring and discharge—both failing to hire and discharging on the basis of age are outlawed under the Act. 29 U.S.C. §623(a)(1).[11] Second, Parker notes the *Metz* court's recognition that use of salary as a proxy for age "is of limited application and may be employed only on a case-by-case basis where the facts support its use." *Metz*, 828 F.2d at 1208. True, but given the way Parker administers its salary step system, reasonable minds could differ about whether salary works as a proxy for age in this case.

Besides attacking the applicability of *Metz*, Parker cites *EEOC v. Atlantic Community School District*, 879 F.2d 434, 437 [50 FEP Cases 545] (8th Cir. 1989) for the proposition that excessive salary is a valid reason for not hiring an individual over the age of 40. The Eighth Circuit in *Atlantic Community School District* upheld the district court's rejection of a jury instruction offered by the EEOC. *Id.* at 435-36. The proposed instruction said it is illegal "for an employer to discriminate against older workers because they are higher in the employer's pay scale

---

[11] *But see EEOC v. Atlantic Community School District*, 879 F.2d 434, 437 [50 FEP Cases 545] (8th Cir. 1989) (distinguishing *Metz*, without analysis, on ground that aggrieved party "had an employment relationship with the employer before age-related salary discrimination occurred"). Granted, a previous employer-employee relationship may strengthen an ADEA claim. *See, e.g., Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 691 [31 FEP Cases 376] (8th Cir. 1983) (rejecting business practices in which "the plain intent and effect ... was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts"). But no case holds that the existence of an employer-employee relationship is a prerequisite to an ADEA claim based on age-related salary discrimination.

as a result of their years of experience." *Id.* at 435. The court said the instruction "would require a finding of age discrimination whenever an applicant 40 and over is not hired by an employer who has agreed to pay salaries based on experience." *Id.* at 437. The court concluded that acceptance of the EEOC's instruction would, "contrary to the ADEA, effectively require a preference in hiring of those 40 and over." *Id.*

Here, perhaps in response to *Atlantic Community School District*, the EEOC consciously avoids a stance that might require a preference in hiring for individuals who are 40 and over. Plaintiff does not contend the ADEA requires Parker to hire older applicants before younger ones even if, under the school's salary chart, older applicants are entitled to wages beyond the salary limit. It simply asks that Parker not disqualify older applicants from competing for positions that, due to budgetary constraints, pay a salary below the level corresponding to the older applicant's years of experience. Therefore, while the court in *Atlantic Community School District* may have had reason for concern about granting a preference in hiring for individuals 40 and over, that danger is not presented under the circumstances of this case.

At this point, it is worth noting that in employment discrimination cases an aggrieved party's "burden of producing evidence sufficient to resist a summary judgment is not onerous." *Klein v. Trustees of Indiana University*, 766 F.2d 275, 282 [38 FEP Cases 290] (7th Cir. 1985). A party can fend off summary judgment by "producing circumstantial evidence from which a trier of fact can reasonably infer that [a discriminatory motive] was a determining factor in the employment decision. Once the plaintiff presents the court with some evidence that his employer harbored the prohibited motive, summary judgment is inappropriate because there is a disputed fact

material to the case." *Id.* (*quoting Parker v. Federal Nat'l Mortgage Assoc.*, 741 F.2d 975, 980 [35 FEP Cases 893] (7th Cir. 1984) (ADEA suit). A more onerous burden would be inconsistent with the general principle that summary judgment is often inappropriate for resolving employment discrimination claims, which involve nebulous questions of motivation and intent. *See Bartman v. Allis-Chalmers Corp.*, 799 F.2d 311, 312 [41 FEP Cases 949] (7th Cir. 1986), *cert. denied*, [479 U.S. 1092], 107 S.Ct. 1304 [43 FEP Cases 80] (1987); *Box v. A & P Tea Co.*, 772 F.2d 1372, 1378 [38 FEP Cases 1509] (7th Cir. 1985), *cert. denied*, [478 U.S. 1010], 106 S.Ct. 3311 [41 FEP Cases 271] (1986).

The EEOC has met its burden here. To survive defendant's motion, the Court need not conclude that Parker's failure to pursue Johnson because he "would require too high a salary under Parker's step system" (Def. Br. at 5) is an admission of age discrimination—a conclusion plaintiff urges on the Court.[12] It is enough that the EEOC has, within the framework of a disparate treatment analysis, adduced sufficient evidence from which a reasonable jury could return a verdict in its favor. *See Anderson*, 106 S.Ct. at 2510. In the Court's view, a reasonable jury could decide that under Parker's implementation of its salary step system, salary operates as a proxy for age. A necessary corollary of such a conclusion is that Parker's asserted budgetary reason for failing to hire Johnson is not a legitimate, nondiscriminatory reason for Parker's decision.

Even if Parker's budgetary rationale qualifies as a legitimate reason for not hiring Johnson, plaintiff would have the opportunity to adduce evidence "that the ostensible nondiscriminatory explanation is in

---

[12] Indeed, it is not the Court's function at the summary judgment stage "to weigh the evidence and determine the truth of the matter ..." *Anderson*, 106 S.Ct. at 2511.

fact a pretext for discrimination." *Mays v. Chicago Sun-Times*, 865 F.2d 134, 137 [48 FEP Cases 1425] (7th Cir. 1989). Presentation of probative statistical evidence is one recognized method of demonstrating that an "employer's proffered reason for an employment decision is actually a pretext for discrimination." *Box*, 772 F.2d at 1379. As discussed in relation to plaintiff's disparate impact theory, the EEOC has presented statistical evidence that provides some support for the conclusion that Parker's budgetary reason for not hiring Johnson was a pretext. Although such evidence does not compel the conclusion that age motivated Parker's decision, *Childress v. Arcata Graphics Co.*, 782 F.Supp. 397, 404 [58 FEP Cases 170] (N.D. Ill. 1992), it compels the denial of summary judgment if it is sufficient to raise "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 106 S.Ct. at 2511; *Childress*, 782 F.Supp. at 404.

4. Disparate Impact

Claims of disparate treatment are distinguishable from disparate impact claims. The latter "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Int'l Brotherhood of Teamsters v. United States*, [431 U.S. 324], 97 S.Ct. 1843, 1854 n.15, [14 FEP Cases 1514] (1977). And unlike disparate treatment claims, proof of a discriminatory motive is not required for claims brought under a disparate impact theory. *Id.* (citations omitted). Instead, the plaintiff "must show 'that the policies and practices at issue have a substantially disproportionate impact on the protected class.'" *Gilty v. Oak Park*, 919 F.2d 1247, 1254 [54 FEP Cases 901] (7th Cir. 1990) (*quoting*

Griffin v. Bd of Regents, 795 F.2d 1281, 1287 [41 FEP Cases 228] (7th Cir. 1986).

To establish a prima facie case of age discrimination by showing disparate impact, "[t]he plaintiff must begin by identifying the specific employment practice that is challenged ..." *Wards Cove Packing Co., Inc. v. Atonio*, [490 U.S. 642], 109 S.Ct. 2115, 2124 [49 FEP Cases 1519] (1989) (citation omitted). Next, the plaintiff must demonstrate "that it is the application of [the challenged employment practice] that has created the disparate impact under attack." *Id.* If the plaintiff makes out a prima facie case, the burden shifts to the employer to produce evidence of a business justification for its use of the challenged practice. *Id.* at 2126. "At that point, the burden shifts back to the plaintiff to show either that the employer's reason is a pretext for discrimination, or that there exists an alternative employment practice, without the disparate impact, that also serves the employer's legitimate interests." *Abbott*, 912 F.2d at 872 (citation omitted).

In assailing plaintiff's disparate impact theory, Parker's arguments are directed exclusively at whether plaintiff's statistical evidence is sufficient to establish a prima facie case. Parker does not offer a business justification for the practice challenged by the EEOC. Therefore, if plaintiff's statistical evidence is sufficient, then plaintiff has established a genuine issue for trial and Parker's motion must be denied.

The EEOC has specifically identified the challenged practice in this case: Parker's implementation of its salary step system in connection with new hires. Plaintiff asserts that Parker uses the challenged practice to screen out applicants, like Johnson, whose experience level places them at the high end of the salary chart. To demonstrate a causal nexus between Parker's hiring practice and the alleged disparate

impact, plaintiff offers the statistical analysis of its expert, Dr. Marc Bendick, Jr.

Dr. Bendick examined the relationship between age and years of teaching experience among likely applicants for teaching positions at Parker. He did this by starting with a universe of 677 applications for teaching positions received by Parker during 1987, 1988 and 1989. Out of the 677 applications, about 650 people were not hired and 27 people were hired. Out of the pool of unsuccessful applications, a 20% random sample was then extracted for comparison against all 27 successful applications.[13] Dr. Bendick opines that under Parker's step system there is a statistically significant relationship between age and experience; the older the applicant the greater his years of experience. Consequently, when Parker sets a low maximum salary limit, a disproportionate percentage of applicants age 40 and older are excluded from consideration. Or, in Dr. Bendick's words, "job applicants age 40 and older would be precluded from hiring at a rate 4.2 times the rate applicable to counterpart applicants aged less than 40."

Parker presents three bases for why Dr. Bendick's analysis fails to support plaintiff's disparate impact theory. First, Parker observes that while only 16% of the applicants in Dr. Bendick's study were age 40 or more, 52% of Parker's teachers were age 40 or more as of September 1988. Second, Parker contends plaintiff's evidence is flawed because a proper statistical analysis would examine the challenged practice's impact on the employer's entire work force rather than a segment of the employer's work force. Lastly, Parker notes that among the group studied by Dr. Bendick, the school hired 23% of the 40 and older applicants and only 19% of the applicants under 40.

---

[13] Ultimately, this procedure generated a sample of 135 applications—all 27 successful applications and 108 unsuccessful applications.

If there is error in the disparate impact aspect of this case it lies in Parker's analysis not plaintiff's. That 52% of Parker's *incumbent* teachers were 40 or older in 1988 proves nothing here. As the EEOC correctly notes, that argument is irrelevant to the claim that Parker screens out disproportionate percentage of *applicants* over 40. Moreover, the Court has no way of knowing what percentage of those incumbent teachers were hired before they reached 40 and then aged on the job. The Court sees no inherent problem with plaintiff's reliance on applicant flow data to make its case. Parker has offered no expert testimony to contradict Dr. Bendick's opinion that such a method is the most appropriate way to analyze Parker's step system. As far as the Court knows, there is no set formula for establishing a disparate impact in employment discrimination cases. And looking at applications received by Parker rather than the school's entire work force makes sense given plaintiff's complaint that Parker screens out a high percentage of applicants.[14]

Furthermore, the Court agrees with plaintiff that Parker's argument about the percentage older applicants actually hired out of the statistical sample smacks of the "bottom line" approach that the Supreme Court rejected in *Connecticut v. Teal*, [457 U.S. 440], 102 S.Ct. 2525 [29 FEP Cases 1] (1982); *cf. Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 691 [31 FEP Cases 376] (8th Cir. 1983) (rejecting

---

[14] *Cf. Geller v. Markham*, 635 F.2d 1027, 1030 [24 FEP Cases 920] (2nd Cir. 1980), *cert. denied*, [451 U.S. 945], 101 S.Ct. 2028 [25 FEP Cases 847] (1981) (finding disparate impact where rule limiting hiring to sixth step of salary schedule disqualified 93% of teachers over 40, but only 60% of teachers under 40). Here, by comparison, according to Dr. Bendick's analysis, Parker's salary limit of $28,000 disqualifies 86% of applicants age 40 and over, but only 20% of those under 40.

"bottom line" defense in ADEA suit). There, the Court stated that the proper focus in disparate impact cases is not "on the overall number of minority or female applicants actually hired," but whether the challenged employment practice "create[s] a discriminatory bar to *opportunities*." *Id.* at 2532 (emphasis in original). The Court noted, for example, that in *Dothard v. Rawlinson*, [433 U.S. 321], 97 S.Ct. 2720, 2729 [15 FEP Cases 10] (1977), the relative percentage of women in the labor force versus women in correctional counselor positions did not govern the Court's decision. Rather, in finding a Title VII violation, the Court "focused instead on the disparate effect that the minimum height and weight standards had on applicants: classifying far more women than men as ineligible for employment." *Id.* Thus, plaintiff's statistical evidence, which focuses on the disparate effect of Parker's hiring practice on applicants age 40 or more, comports with the Supreme Court's teaching in *Teal* while defendant's criticism of plaintiff's evidence does not.

In short, plaintiff's statistical evidence is sufficient to establish a prima facie case of age discrimination based on a showing of disparate impact.

CONCLUSION

Plaintiff's action is not time-barred and Parker is not exempted from liability under §623(f)(2) of the ADEA. Furthermore, plaintiff has established a genuine issue for trial under both a disparate treatment and disparate impact theory. Summary judgment is therefore inappropriate.

APPENDIX D

MINUTE ORDER (June 14, 1993)

(EEOC v. Francis Parker School, 91 C 4674)

Defendant Francis W. Parker School has moved for reconsideration of this Court's March 23, 1993 Memorandum Opinion and Order denying Parker's motion for summary judgment on plaintiff's disparate treatment and disparate impact claims. With regard to plaintiff's disparate treatment claim, the Court agrees with defendant that the Court's March 23 Memorandum Opinion must be reconsidered in light of the Supreme Court's recent decision in *Hazen Paper Co. v. Biggin*, 1993 U.S. LEXIS 2978 (April 20, 1993).

Hazen teaches that Parker's consideration of budgetary factors that tend to eliminate older job applicants from consideration is not evidence of disparate treatment under the ADEA. This Court previously held otherwise because *Metz v. Transit Mix, Inc.*, 828 F.2d 1201, 1207 (7th Cir. 1987) suggests that the ADEA is violated when there is a statistically significant correlation between age and a factor motivating an employer's conduct, like higher salary. *Hazen* rejects that notion. The Court stated that age and factors that correlate with age, like pension status or years of work experience, are analytically distinct; "an employer can take account of one while ignoring the other . . ." *Hazen* at *14. Therefore, "it is incorrect to say that a decision based on years of experience is necessarily 'age-based.'" *Id.*

Defendant is correct that under *Hazen* EEOC must have additional evidentiary support for its disparate treatment claim apart from the correlation

between age and salary. But the EEOC has no additional evidence to support its claim. Plaintiff's disparate treatment claim is based solely on the statistical correlation between age and years of teaching experience under Parker's salary step system. That correlation, without more, will not support ADEA liability. Accordingly, defendant's motion for summary judgment on plaintiff's disparate treatment claims is granted.

The Court will not reconsider its denial of defendant's summary judgment motion on plaintiff's disparate impact claim. Defendant concedes it never challenged the availability of the disparate impact theory of liability under the ADEA in its motion for summary judgment, and this Court did not rule on the question. It would be inappropriate for the Court to reach this newly raised issue here under the guise of "reconsideration." In any event, *Hazen* does not change the law concerning disparate impact analysis. The Court expressly stated that it had never "decided whether a disparate impact theory of liability is available under the ADEA . . . and we need not do so here." *Id.* at *11. Under these circumstances, there is no basis for certifying this issue for immediate appeal under 28 U.S.C. § 1292(b). This ruling should not be read as foreclosing a further dispositive motion directed specifically to disparate impact liability.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 93-3395

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Plaintiff-Appellant

v.

FRANCIS W. PARKER SCHOOL
Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Filed Nov. 18, 1994]

ORDER

BEFORE: BAUER and CUDAHY, Circuit Judges.
GRANT, District Judge*

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-

---

* The Honorable Robert A. Grant, United States District Judge for the Northern District of Indiana, is sitting by designation.

captioned case by plaintiff-appellant, a majority of the judges on the original panel have voted to deny and none of the judges in active service has requested a vote thereon[1].

Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

---

[1] The Honorable Joel M. Flaum and The Honorable Ilana D. Rovner took no part in the consideration of this petiton.

APPENDIX F

RELEVANT PROVISIONS OF THE
AGE DISCRIMINATION IN EMPLOYMENT
ACT OF 1967,
29 U.S.C. 621 *et seq.*

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and

workers find ways of meeting problems arising from the impact of age on employment.

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

* * * * *

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age * * *.

* * * * *

RELEVANT PROVISION OF
TITLE VII OF THE CIVIL RIGHTS ACT OF 1964,
42 U.S.C. 2000e *et seq.*

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employer, because of such individual's race, color, religion, sex, or national origin.

* * * * *

(2)

No. 94-1558

SUPREME COURT, U.S.
FILED
MAY 30 1995
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

FRANCIS W. PARKER SCHOOL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES L. MICHOD, JR.*
DON R. SAMPEN
MARTIN, CRAIG, CHESTER & SONNENSCHEIN
135 South LaSalle Street
19th Floor
Chicago, Illinois 60603
(312) 368-9700

CARTER G. PHILLIPS
CONSTANTINE L. TRELA, JR.
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Respondent

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

24pp

QUESTION PRESENTED

Whether the court of appeals properly held that a single applicant for employment who was not hired because, under the employer's policy and collective bargaining agreement, his work experience would require a salary far in excess of what was available under the employer's budget, had no claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties. The respondent, a not-for-profit corporation, has no parent companies or subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	5
CONCLUSION	18

TABLE OF AUTHORITIES

CASES — Page

Arnold v. *United States Postal Serv.*, 863 F.2d 994 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 846 (1989) 9
California Brewers Ass'n v. *Bryant*, 444 U.S. 598 (1980) 11
City of Los Angeles Dep't of Water and Power v. *Manhart*, 435 U.S. 702 (1978) 15
County of Washington v. *Gunther*, 452 U.S. 161 (1981) 15
DiBiase v. *SmithKline Beecham Corp.*, 48 F.3d 719 (3d Cir. 1995) 8
EEOC v. *Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984), *overruled in part by Public Employees Retirement Sys.* v. *Betts*, 492 U.S. 158 (1989), *as recognized in American Ass'n of Retired Persons* v. *Farmers Group, Inc.*, 943 F.2d 996 (9th Cir. 1991) 6
EEOC v. *Local 350, Plumbers and Pipefitters*, 998 F.2d 641 (9th Cir. 1992) 8, 9
EEOC v. *Wyoming*, 460 U.S. 226 (1983) 15, 16
Faulkner v. *Super Valu Stores, Inc.*, 3 F.3d 419 (10th Cir. 1993) 9
Geller v. *Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) 6, 14
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 13, 16
Hazen Paper Co. v. *Biggins*, 113 S. Ct. 1701 (1993) 3, 4, 6, 7, 9
Hiatt v. *Union Pac. R.R.*, 859 F. Supp. 1416 (D. Wyo. 1994) 8
Houghton v. *Sipco, Inc.*, 38 F.3d 953 (8th Cir. 1994) 8
Leftwich v. *Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983) 6
Lorillard v. *Pons*, 434 U.S. 575 (1978) 13
Martincic v. *Urban Redevelopment Auth.*, 844 F. Supp. 1073 (W.D. Pa. 1994) 8
Massarsky v. *General Motors Corp.*, 706 F.2d 111 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983) 9

TABLE OF AUTHORITIES—Continued

Page

Metz v. *Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987) 7, 15
Wards Cove Packing Co. v. *Atonio*, 490 U.S. 642 (1989) 12
Washington v. *Davis*, 426 U.S. 229 (1976) 13

STATUTES, LEGISLATIVE MATERIALS AND REGULATIONS

Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* i
§ 623 ..... 1, 10, 11, 13, 14
42 U.S.C. § 2000e-2 ..... 10, 12
The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 12
137 *Cong. Rec.* S15276 (1991), *reprinted in* 1991 *U.S.C.C.A.N.* 767 12
29 C.F.R. § 1607.11 (1988) 14

OTHER AUTHORITIES

EEOC, *Legislative History of the Age Discrimination In Employment Act* (1981) 15
2A Sutherland Statutory Construction § 46.06 (5th ed. 1992 rev.) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1558

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

FRANCIS W. PARKER SCHOOL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Francis W. Parker School, hereby opposes the petition for a writ of certiorari filed by the Equal Employment Opportunity Commission and urges the Court to deny the Commission's request to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

STATUTORY PROVISION INVOLVED

Petitioner correctly cites the statutes involved. Section 4(f)(2) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(f)(2), which was omitted from petitioner's appendix (see Pet. App. 47a), states in relevant part as follows (as it read in 1989):

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> * * * *

(2) to observe the terms of a bona fide seniority system . . . which is not a subterfuge to evade the purposes of this chapter . . . .

STATEMENT OF THE CASE

1. Respondent, Francis W. Parker School, is a private, not-for-profit primary and secondary school operating in Chicago. It had 84 full- or part-time teachers during the 1988-89 school year. At least 52 percent of its teachers were in the age category of 40 or older at the beginning of that school year. (R. 32, Cotton Aff. ¶¶ 1-3 and Ex. A to R. 32.)[1] According to the statistical evidence presented by petitioner below, respondent hired a greater percentage of teacher applicants age 40 or older than it hired teacher applicants under the age of 40. (R. 32, Ex. G, Attach. D.)

Respondent's teacher salaries are set in accordance with its collective bargaining agreement with its teachers. The agreement embodies a 22-step system in which each step corresponds to a teacher's years of experience, up to 22 years, and provides for an increasing level of salary based directly on years of experience. (Pet. App. 2a.) In 1989, a teacher with one year of experience—step 1—was paid about $22,000. A teacher with 22 years of experience was paid about $46,000. (Pet. App. 19a-20a.) Respondent used the same system to determine the starting salaries of new teachers. It credited new teachers with years of teaching elsewhere. (Pet. App. 2a.)

The step system rewards experience and encourages teachers to stay in teaching. The system has worked well for respondent in attracting and retaining high-quality educators. (R. 32, Cotton Aff. ¶ 5.) Nevertheless, because of budgetary constraints, respondent must seek a balance in its faculty between more experienced teachers

---

[1] "R" refers to the numbered items in the official record of the court of appeals.

at higher salaries and less experienced teachers at lower salaries. (R. 32, Cotton Aff. ¶ 6.)

A vacancy opened in respondent's drama department early in the 1988-89 school year. Paul Druzinsky, the drama department head, led the search for the new teacher. (Pet. App. 20a.) Respondent's principal, John Cotton, restricted by the school's budgetary constraints, set a maximum salary for the new teacher of $28,000. (Pet. App. 2a.) After publicizing the vacancy, Druzinsky received and reviewed 15 to 30 resumes and interviewed about a half dozen candidates. (Pet. App. 20a.) He then narrowed the pool to three finalists and submitted their names to Cotton. (Pet. App. 21a.) The finalist interviews took place between March 14 and March 24, 1989. After a meeting on March 27, Nancy Bishop was selected to fill the vacancy at a starting salary of $22,000. (*Id.*)

In the meantime, on March 13, after Druzinsky had announced the three finalists, one of respondent's music teachers asked Druzinsky to review the resume of a drama teacher named Harold Johnson. (Pet. App. 2a.) Johnson was 63 years old with 30 years of teaching experience. (*Id.*) Under respondent's step system of compensation, Johnson's salary would have been $46,000. Accordingly, Druzinsky called Johnson a week later to advise Johnson that he would not be hired because respondent could not afford him. (Pet. App. 2a-3a.)

2. Johnson filed an administrative complaint with petitioner Equal Employment Opportunity Commission on April 11, 1989. Petitioner filed this lawsuit in the United States District Court for the Northern District of Illinois, alleging a violation of the ADEA, 29 U.S.C. § 621 *et seq.*, under both disparate treatment and disparate impact theories. Respondent moved for summary judgment on August 27, 1992, and that motion was denied on March 23, 1993. (Pet. App. 19a.) *Hazen Paper Co.* v. *Biggins*, 113 S. Ct. 1701 (1993), was decided shortly thereafter, and respondent moved for reconsideration based on *Hazen*

Paper. The district court allowed the motion and granted summary judgment on the disparate treatment claim only. (Pet. App. 42a.) Pursuant to the court's invitation, respondent then filed a further motion for summary judgment on the disparate impact claim. That motion was granted by order dated July 22, 1993. (Pet. App. 17a.)

The district court's final order granting summary judgment on the disparate impact claim did not reach either of the issues petitioner seeks to have this Court address. Rather the court found that respondent's decision not to hire Johnson was "wholly motivated by budgetary constraints," and that such a decision is not covered by the ADEA. (Pet. App. 18a.) The court expressly refrained from "reach[ing] the broader question of whether the disparate impact theory is fundamentally incompatible with ADEA liability." (*Id.*)

3. Petitioner appealed, but sought review only on the disparate impact issue. A divided Seventh Circuit affirmed on three grounds. First, the court of appeals relied upon this Court's interpretation of the ADEA in *Hazen Paper*. This Court in *Hazen Paper* observed that inaccurate stereotyping of the elderly is "the essence of what Congress sought to prohibit in the ADEA." 113 S. Ct. at 1706. (Pet. App. 5a.) Although recognizing that *Hazen Paper* was a disparate treatment case, the court of appeals concluded that the logic of this Court's decision indicated that employment decisions "not based on misperceptions about the competence of older workers" do not violate the ADEA. (Pet. App. 6a.)

Second, the court of appeals found significant distinctions between the language of the ADEA and Title VII, which made the latter a treacherous basis for construing the former statute. For example, the court construed section 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1), as evidencing the Act's sole focus on eliminating decisions based on stereotypes about age. (Pet. App. 6a-7a.) Section 4(f)(1) has no parallel in Title VII. The court also

noted that, while section 703(a)(2) of Title VII proscribes actions by employers which "limit, segregate, or classify [their] employees or *applicants for employment*," the corresponding provision in section 4(a)(2) of the ADEA omits applicants from its coverage. (Pet. App. 8a.)

Third, the court of appeals found that, even under a disparate impact theory, petitioner was not "relieve[d] . . . of its obligation to prove the error of the employer's way." (Pet. App. 9a.) Petitioner utterly failed to establish the unreasonableness of respondent's policy. Indeed, the court specifically found that respondent's "policy of linking wages to experience is an economically defensible and reasonable means of determining salaries." (*Id.*)

REASONS FOR DENYING THE PETITION

1. The primary rationale offered by petitioner (Pet. 8-9) for review by this Court is an alleged conflict between the decision below and prior decisions of other circuits, which applied disparate impact analysis to particular ADEA claims. The fundamental flaw in petitioner's argument is that it is predicated on a profound mischaracterization of the holding below. To be sure, the court of appeals strongly hinted that disparate impact may not be a viable theory of liability under the ADEA in light of this Court's interpretation of the Act in *Hazen Paper*, but it manifestly did not so hold. Instead, it merely held that the prior decisions relied upon by petitioner that had employed disparate impact analysis in age discrimination cases are "inappropriate on the facts of this case." (Pet. App. 7a.)[2] Thus, the court of appeals did not purport to place itself in conflict with any other courts of appeals.

Absent an unquestioned conflict with a prior decision, it is difficult to understand why the Court should consider

[2] Indeed, even Judge Cudahy in his dissent recognized that the majority opinion stopped "slightly short" of extending as far as petitioner suggests. (Pet. App. 10a.)

the disparate impact theory under the ADEA at this time. There are several aspects about the state of the law surrounding the availability of disparate impact analysis under the ADEA that militate against review of that issue now. First, in the three cases cited by petitioner as being in direct conflict with the decision here, there was virtually no legal analysis of the issue. See *Geller* v. *Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980) (analysis of issue restricted to one paragraph), *cert. denied*, 451 U.S. 945 (1981); *EEOC* v. *Borden's, Inc.*, 724 F.2d 1390, 1394 (9th Cir. 1984) (same), *overruled in part by Public Employees Retirement Sys.* v. *Betts*, 492 U.S. 158, 173-75 (1989), *as recognized in American Ass'n of Retired Persons* v. *Farmers Group, Inc.*, 943 F.2d 996, 1004 (9th Cir. 1991); *Leftwich* v. *Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir. 1983) (no discussion of the issue at all). Indeed, the Chief Justice's dissent from the denial of certiorari in *Geller* contains a lengthier statutory analysis of the issue than the opinions of the three courts of appeals combined. See *Markham* v. *Geller*, 451 U.S. 945, 947-48 (1981).

Second, all three decisions pre-date *Hazen Paper*. While the holding in that case unquestionably was limited to disparate treatment claims under the Act—which the court of appeals recognized—this Court's analysis of the intent of Congress embodied in the statute provides insights into how the ADEA ought to be applied in all cases. Thus, for example, the Court's observation that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA," 113 S. Ct. at 1706, indicates that the Act is somewhat narrower than Title VII. This is plainly relevant to deciding whether and how to proceed with a disparate impact analysis.

Further statements made in *Hazen Paper* cast even more doubt on the validity of the disparate impact theory.

According to the Court, Congress was concerned "that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes," of necessity a form of disparate treatment. *Id.* Yet, the Court went on,

> When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is.

Id. The Court went even further:

> Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age-based."

Id. at 1707. The Court then concluded that the ADEA "requires the employer to ignore an employee's age . . . ; it does not specify *further* characteristics that an employer must also ignore." *Id.*

A disparate impact analysis targets those very factors that are "analytically distinct" from age. Employment actions based on these types of factors, however, are not prohibited under the ADEA as construed in *Hazen Paper*. Short of an actual holding on the issue, it is difficult to imagine a much more explicit direction from this Court that a disparate impact theory is not available under the Act.

Petitioner is clearly wrong to assume that the analysis in *Hazen Paper* will not affect how the lower courts approach disparate impact claims under the ADEA. The Seventh Circuit's decision below is a counter example. Compare Pet. App. 1a-9a (refusing to apply disparate impact analysis to facts of this case) with *Metz* v. *Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987) (assuming that disparate impact theory is valid under

ADEA). At least three other examples also exist. *DiBiase* v. *SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir. 1995) ("in the wake of *Hazen*, it is doubtful that traditional disparate impact theory is a viable theory of liability under the ADEA"; the court, however, found it unnecessary to decide the ultimate issue); *Hiatt* v. *Union Pac. R.R.*, 859 F. Supp. 1416, 1436 (D. Wyo. 1994) ("disparate impact claims are not cognizable under the ADEA"); *Martincic* v. *Urban Redevelopment Auth.*, 844 F. Supp. 1073, 1076-77 (W.D. Pa. 1994) ("we are convinced disparate impact is not a cognizable claim under the ADEA").

Petitioner recognizes this problem and cites (Pet. 9) two post-*Hazen Paper* cases to suggest that the Eighth and Ninth Circuits will not reconsider their positions. But neither case had occasion to analyze the issue or demonstrate that a decisional conflict exists after *Hazen Paper*. In *Houghton* v. *Sipco, Inc.*, 38 F.3d 953, 958-59 (8th Cir. 1994), for example, the court reversed a disparate impact determination based on a faulty jury instruction and did not need to address the general availability of the theory. In *EEOC* v. *Local 350, Plumbers and Pipefitters*, 998 F.2d 641, 648 n.2 (9th Cir. 1992), the court discussed *Hazen Paper* in a footnote, but noted that the EEOC had failed to articulate whether it was proceeding on a disparate impact or disparate treatment theory, and it remanded in part on that basis. Accordingly, the court had no reason to consider the effect of *Hazen Paper* on a disparate impact claim.

Petitioner cites (Pet. 8-9) a half dozen other cases in which courts "assumed that the ADEA prohibits disparate impact discrimination." Even petitioner seems to acknowledge that those cases do not provide any independent basis for review by this Court because there clearly was no holding on the threshold question of whether that theory of liability is viable under the ADEA. In at least three of the cases, moreover, the courts expressly declined

to decide the applicability issue as unnecessary because there was a failure to prove any disparate impact. *Faulkner* v. *Super Valu Stores, Inc.*, 3 F.3d 1419, 1428 (10th Cir. 1993); *Arnold* v. *United States Postal Serv.*, 863 F.2d 994, 998 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 846 (1989); *Massarsky* v. *General Motors Corp.*, 706 F.2d 111, 121 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983). In the remaining cases, relief was similarly denied because of a failure of proof. Therefore, none of these cases is in conflict with the Seventh Circuit.

In sum, it is fanciful to assume that pre-*Hazen Paper* rulings will retain their vitality in light of the Court's clear guidance on the scope and purpose of the ADEA. The Court should wait to see if a genuine conflict in the circuits arises post-*Hazen Paper* before resolving the question presented.

Finally, petitioner's showing that the issue has significant consequences that make it worthy of review is woefully inadequate. Petitioner can identify no more than "approximately 20 suits" over the course of the past six years in which a disparate impact theory was even included in a complaint. Petitioner does not attempt to show that the theory had any relevance to the ultimate disposition of *any* of those cases. Given that disparate impact cases can readily be converted to disparate treatment cases by proof of motive,[3] it is possible that all the cases included in the EEOC's informal survey would have been resolved in precisely the same way with or without the disparate impact theory. Thus, petitioner has no overriding enforcement need to have the disparate impact issue resolved that could excuse the absence of a real conflict in the circuits as a basis for obtaining certiorari.

---

[3] *See, e.g., Hazen Paper Co.* v. *Biggins*, 113 S. Ct. 1701, 1705 (1993); *EEOC* v. *Local 350, Plumbers and Pipefitters*, 998 F.2d 641, 648 n.2 (9th Cir. 1992).

2. Not only is there no need to decide the disparate impact issue at this time, but this case is an extraordinarily poor vehicle for deciding the issue in any event. There are at least three considerations present here—and absent from the other cases cited by petitioner—that provide an independent basis for affirming the Seventh Circuit and thus make it unnecessary for this Court to reach the disparate impact theory.

First, petitioner never explains why the disparate impact issue should be considered in a case involving an applicant for employment. There is no question that the pivotal language in Title VII "applicants for employment" is excluded from the operative provision in the ADEA. Compare 42 U.S.C. § 2000e-2(a)(2) with 29 U.S.C. § 623(a)(2). None of the other cases involving the disparate impact theory that are cited by petitioner as in conflict with the decision below involved an applicant for employment. This is a unique twist that complicates the case and jeopardizes the Court's ability to rule on the underlying issue of the validity of the disparate impact theory under the ADEA.

Petitioner presents (Pet. i) the applicability of the ADEA to applicants as a separate issue in the petition, but that issue is plainly unworthy of review by this Court. Petitioner does not even cite one other case in which the issue has been resolved, much less any decision that conflicts with the treatment below. Moreover, the issue was not separately decided in this case; it was merely used as a basis for distinguishing Title VII in the process of deciding how to apply the disparate impact theory to this case.

Second, the employment policy applied in this case was based on a seniority system embodied in a collective bargaining agreement, which also complicates the case and makes it a questionable vehicle for deciding the issue presented by petitioner. Section 4(f)(2) of the ADEA provides an exemption for an employer "to observe the

terms of a bona fide seniority system . . . which is not a subterfuge to evade the purposes" of the ADEA. 29 U.S.C. § 623(f)(2). The court of appeals found that the respondent's step system was protected by this "safe harbor." (Pet. App. 9a.)

Petitioner argued below that the step system does not qualify as a seniority system because a seniority system applies only to incumbent employees. In *California Brewers Ass'n* v. *Bryant*, 444 U.S. 598 (1980), this Court held that a "seniority system" is a scheme that "allots to employees ever improving rights and benefits as their relative lengths of pertinent employment increase." *Id.* 605-06. The Court went on to make clear, however, that the rights could begin to accumulate either at the time of company employment or at the time of industry employment. *Id.* at 606-07 & n.17. This definition clearly encompasses respondent's step system and hiring policy.

The applicability of the section 4(f)(2) exemption makes it unnecessary for this Court to reach the question raised in the petition. This Court, moreover, has already provided direction to the lower courts with respect to the definition of a seniority system. Petitioner makes no claim that the court of appeals' reliance on section 4(f)(2) was in error or that the court applied that section in a manner inconsistent with other courts of appeals or the direction provided by this Court. Accordingly, the Court should choose a better case in which to address petitioner's argument.

Third, even if the disparate impact theory applied, respondent had a completely valid business justification for its employment decision. Thus, resolution of the question presented by petitioner not only would make virtually no difference to petitioner's enforcement of the ADEA, but also would not even make any difference in the proper outcome of this case.

In *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989), this Court explained the nature of the business justification required of a defendant in a Title VII case. Under the *Wards Cove* standard,[4] respondent's reliance upon the step system was plainly legal. Respondent declined to hire Johnson solely because he was too expensive. And petitioner did not directly challenge this justification in the courts below. Instead, it argued that respondent should modify the step system policy to enable applicants with high experience levels to compete for low-paying positions. (See Pet. 3.) The court of appeals rejected this argument. The court found that respondent's "policy of linking wages to experience is an economically defensible and reasonable means of determining salaries." (Pet. App. 9a.)

Nothing more is required under *Wards Cove*. Once a policy is found to be reasonable, there is no requirement that the employer modify the policy for each new circumstance each time the policy is to be applied. Under *Wards Cove*, a plaintiff may propose an alternative policy or "selection device," but the employer need not adopt it unless the plaintiff establishes that the employer's current policy is a mere "pretext" for discrimination. 490 U.S. at 660. The district court found that respondent's policy was not a mere pretext. (Pet. App. 18a.) Accordingly, whether or not petitioner can rely generally on a disparate impact theory, it is clear that no violation of the ADEA is present here under any theory. The Court should wait for a case in which the question presented in the petition is critical to the outcome of the dispute.

---

[4] The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 ("CRA"), restored pre-*Wards Cove* disparate impact standards to Title VII. 42 U.S.C. § 2000e-2(k); "Interpretive Memorandum," 137 *Cong. Rec.* S15276 (1991), *reprinted in* 1991 *U.S.C.C.A.N.* 767. The CRA did not amend the ADEA. Petitioner acknowledged the limited scope of the CRA in its brief in the court of appeals.

3. Petitioner devotes (Pet. 9-14) the bulk of its petition to arguing that the decision below was incorrect. Obviously, mere error is not a compelling reason to grant any petition. In this case, however, the court of appeals clearly was correct in its interpretation. As shown above, the decision below was plainly faithful to the spirit of *Hazen Paper* in limiting the sweep of the ADEA. Moreover, the decision is completely supported by the language, structure and history of the Act.

a. Petitioner argues (Pet. 9-10) that the similarity in some of the language between Title VII and the ADEA compels a different conclusion. While there are some similarities in language, there are also many differences. Indeed, in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), cited by petitioner, this Court noted both similarities and differences. In particular, it found "significant differences" in the "remedial and procedural provisions of the two laws." *Id.* at 584.

The very fact that Congress placed age discrimination restrictions in a statutory scheme separate from Title VII suggests that the two laws need not be construed in the same way. See *Washington* v. *Davis*, 426 U.S. 229, 255 (1976) (Stevens, J., concurring) ("there is sufficient individuality and complexity to [Title VII], and to the regulations promulgated under it, to make it inappropriate simply to transplant those standards in their entirety into a different statutory scheme having a different history").

One important difference in language between Title VII and the ADEA is section 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1). This provision has no parallel in Title VII. It exempts from the ADEA actions based on "reasonable factors other than age." This difference was emphasized by the court below. (Pet. App. 6a-7a.) Petitioner (Pet. 11-12) urges this Court to ignore this difference in the two statutory schemes. It argues that the reasonable factors provision simply adopts the "business necessity" standard of Title VII, recognized in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

Petitioner's interpretation renders the entire exception meaningless. Business necessity concepts were already a part of Title VII, even in the absence of the "reasonable factors" language, prior to *Wards Cove*. See, *e.g.*, 29 C.F.R. § 1607.11 (1988) (under petitioner's impact theory, selection procedures will be invalidated unless a "business necessity" is demonstrated). See also pp. 11-12, *supra*. In its brief in the court of appeals, petitioner advocated the traditional rule of statutory construction that meaning must be given to each word and clause in a statute. See 2a Sutherland Statutory Construction § 46.06 (5th ed. 1992 rev.). Petitioner now reverses itself and argues, in effect, that an entire statutory exception should be read out of the statute.

Apart from making the language meaningless, petitioner's interpretation is inconsistent with the language of section 4(f)(1). That section states in relevant part:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification, reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age. . . .

29 U.S.C. § 623(f)(1). This language readily shows that the "reasonable factors" exception is set forth in the disjunctive to the bona fide occupational qualification ("BFOQ") exception described in the first part of subparagraph (1). The business necessity standard applies to the BFOQ. It clearly does not modify an employer's right to rely upon "reasonable factors other than age."

In his dissent from the denial of certiorari in *Markham* v. *Geller*, 451 U.S. 945, 948-49 (1981), the Chief Justice made clear his view that the reasonable factors language of section 4(f)(1) undermined the application of a disparate impact theory to an ADEA claim. Judge Easterbrook reached the same conclusion in his dissent

in *Metz* v. *Transit Mix, Inc.*, 828 F.2d 1202, 1220 (7th Cir. 1987) (Easterbrook, J., dissenting). Judge Easterbrook relied, in part, upon the interpretation by this Court of similar language in the Equal Pay Act. *County of Washington* v. *Gunther*, 452 U.S. 161, 170-71 (1981); *City of Los Angeles Dep't of Water and Power* v. *Manhart*, 435 U.S. 702, 710-11 n.20, 713 n.24 (1978). This Court's construction of the Equal Pay Act adds considerable weight to the Seventh Circuit's reliance on the reasonable factors language in reaching its decision below.

The court of appeals thus appropriately considered differences between the ADEA and Title VII and relied upon those differences in correctly interpreting the ADEA. There consequently is no need for this Court further to consider the matter based on alleged error.

b. Although the court of appeals did not find it necessary to analyze the legislative history of the ADEA, that history fully supports the court's decision. This Court in *EEOC* v. *Wyoming*, 460 U.S. 226 (1983), analyzed the legislative history in detail. The Court in *Wyoming* discussed a report of the Secretary of Labor entitled "The Older American Worker: Age Discrimination in Employment" (1965) ("Secretary's Rep."), the preparation of which had been mandated in the Title VII legislation.

The Secretary's Report is reprinted in EEOC, *Legislative History of the Age Discrimination In Employment Act* (1981). It provided much of the factual and theoretical bases for the ADEA. The Court summarized the Secretary of Labor's findings, which it noted were confirmed by the Executive Branch and Congress:

> (1) Many employers adopted specific age limitations in those States that had not prohibited them by their own antidiscrimination laws, although many other employers were able to operate successfully without them. (2) In the aggregate, these age limitations had a marked effect upon the employment of

> older workers. (3) Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual causes. (4) Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers. (5) Finally, arbitrary age discrimination was profoundly harmful . . . .

460 U.S. at 231.

The ADEA thus evolved from a concern with the harm resulting from specific but arbitrary age limitations based on a stereotypical view of older workers, and not on the kind of invidious animus that gave rise to other anti-discrimination legislation. Secretary's Rep. 6 ("We have found no evidence of prejudice based on dislike or intolerance of the older worker"). This view of the ADEA legislative history may be readily contrasted with this Court's treatment of Title VII, where the Court found a clear congressional intent to eradicate longstanding employment barriers that "operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971); see also Secretary's Rep. 5-6 ("Discrimination in employment based on race . . . is accompanied by and often has its origin in prejudices that originate outside the sphere of the employment").

The Secretary's Report specifically recommended legislation to deal with the problems of "persistent and widespread use of age limits in hiring" which amounted to "arbitrary discrimination against older workers." Secretary's Rep. 37. As to "employment practices which quite unintentionally lead to age limits in hiring"—*i.e.*, disparate impact discrimination—no legislation was recom-

mended. Secretary's Rep. 38. Rather, the Secretary suggested other responses, such as studying the feasibility of a system of portable pension credits, encouraging new forms of private annuity coverage and reviewing gaps in workers' compensation plans. *Id.*

In short, the ADEA's legislative history indicates that the legislation targeted intentional, disparate treatment type age discrimination, and not unintentional disparate impacts. This Court has already explored the ADEA's legislative history in *Wyoming*, and no purpose would be served by a further review of it in this case.

* * * *

At the end of the day, it is difficult to understand why petitioner has sought review of this case. The holding below is much more equivocal than petitioner suggests. That holding follows from a very recent decision of this Court, which has not yet been analyzed extensively by the lower courts. Moreover, to get to the issue on which petitioner seeks review, the Court must resolve a threshold question concerning the applicability of the Act to applicants for employment, an issue which is in no way worthy of this Court's attention.

Nor is there anything specific about this case that makes it particularly worthy of note. Respondent plainly did not act invidiously in declining to hire Johnson. It acted pursuant to unquestionably real budgetary constraints and followed the dictates of its bona fide seniority system, which was the product of collective bargaining. To have treated Johnson as petitioner proposes would have violated respondent's hiring policy under that agreement, a point petitioner reasonably can ignore but respondent could not.

In addition, respondent is a small educational institution with limited resources. Its money will be better spent educating its students than litigating this case further. That might not be reason enough to deny review

in a case otherwise clearly worthy of this Court's attention, but it certainly should tip the balance against review in a case presenting an issue that so plainly does not require resolution by this Court at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES L. MICHOD, JR.*
DON R. SAMPEN
MARTIN, CRAIG, CHESTER & SONNENSCHEIN
135 South LaSalle Street
19th Floor
Chicago, Illinois 60603
(312) 368-9700

CARTER G. PHILLIPS
CONSTANTINE L. TRELA, JR.
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Respondent

* Counsel of Record

May 30, 1995

(3)

No. 94-1558

FILED
JUN 9 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FRANCIS W. PARKER SCHOOL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JOHN P. ROWE
General Counsel (Acting)
Equal Employment Opportunity Commission
Washington, D.C. 20507

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Cases:	Page
DiBiase v. *SmithKline Beecham Corp.*, 48 F.3d 719 (3d Cir. 1995)	2
EEOC v. *Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984)	3, 4
EEOC v. *Local 350, Plumbers & Pipefitters*, 998 F.2d 641 (9th Cir. 1992, amended 1993)	5
Gehring v. *Case*, 43 F.3d 340 (7th Cir. 1994), petition for cert. pending (No. 94-1780)	2
Geller v. *Markham*, 635 F.2d 1027 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981)	3, 4
Hazen Paper Co. v. *Biggins*, 113 S. Ct. 1701 (1993)	4
Houghton v. *Sipco, Inc.*, 38 F.3d 953 (8th Cir. 1994)	5
Leftwich v. *Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983)	3, 4
St. Mary's Honor Center v. *Hicks*, 113 S. Ct. 2742 (1993)	9
Wards Cove Packing Co. v. *Atonio*, 490 U.S. 642 (1989)	8, 9
Statutes:	
29 U.S.C. 621(b)	7
29 U.S.C. 623(a)(2)	6
29 U.S.C. 623(f)(2) (1988 & Supp. V 1993)	7
Miscellaneous:	
118 Cong. Rec. 4943 (1972)	6

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1558

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

FRANCIS W. PARKER SCHOOL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In our petition, we have argued that the Court should grant certiorari to resolve the question whether the ADEA prohibits disparate impact discrimination. We have also argued that the Court should grant review of the related question whether the ADEA's prohibition of disparate impact discrimination protects applicants for employment. In its brief in opposition, respondent argues that review in this case is unwarranted for several reasons. None, however, is persuasive.

1. Respondent argues that the "fundamental flaw" in our petition is that while the court of appeals

"strongly hinted that disparate impact may not be a viable theory of liability under the ADEA, * * * it manifestly did not so hold." Br. in Opp. 5. The court below expressly held, however, that "decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited [by the ADEA]." Pet. App. 6a. Because the EEOC had failed to demonstrate that respondent's practice was "a subterfuge for the belief that older teachers are less effective than younger teachers," and demonstrated only that the challenged practice "disproportionately affects older applicants," the court affirmed the district court's decision granting summary judgment in favor of respondent. *Id.* at 9a. It is therefore clear that the court of appeals held that the ADEA does not prohibit disparate impact discrimination and ruled against the EEOC on that basis.

Not surprisingly, the Seventh Circuit has subsequently characterized the decision in this case as holding that disparate impact is "a theory of age discrimination that is unavailable in this circuit." *Gehring* v. *Case Corp.*, 43 F.3d 340, 342 (1994) petition for cert. pending (No. 94-1780). And in a case relied upon by respondent (Br. in Opp. 8), Judge Greenberg recently characterized the decision in the same way. See *DiBiase* v. *SmithKline Beecham Corp.*, 48 F.3d 719, 733 (3d Cir. 1995) (Greenberg, J.) (citing this case for the proposition that "[t]he Court of Appeals for the Seventh Circuit * * * recently held that disparate impact liability is unavailable under the ADEA").[1]

---

[1] Respondent asserts (Br. in Opp. 5 n.2) that "even Judge Cudahy in his dissent recognized that the majority opinion

2. As we have explained in our petition (Pet. 8-9), review is warranted in this case because the Seventh Circuit's holding that the ADEA does not prohibit disparate impact discrimination conflicts with decisions from the Second, Eighth, and Ninth Circuits. See *Geller* v. *Markham*, 635 F.2d 1027, 1032-1034 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981); *Leftwich* v. *Harris-Stowe State College*, 702 F.2d 686, 690-692 (8th Cir. 1983); *EEOC* v. *Borden's Inc.*, 724 F.2d 1390, 1394-1395 (9th Cir. 1984). Respondent contends (Br. in Opp. 6) that the Court should not grant review to resolve that conflict because *Geller*, *Leftwich*, and *Borden's* contain "virtually no legal analysis." The existence of a conflict in the circuits, however, does not depend on the quality or extent of a court's legal analysis. In any event, the issue in this case does not require an elaborate legal analysis. As we have argued in our petition (Pet. 9-10), the reason that the ADEA should be interpreted to reach disparate impact discrimination is that the substantive prohibitions in the ADEA are identical to the substantive prohibitions in Title VII, and this Court has authoritatively construed Title VII to reach disparate impact discrimination. *Geller* and *Borden's* expressly adopted that analysis and, by relying on

---

stopped 'slightly short' of extending as far as petitioner suggests." What Judge Cudahy actually said was that "the majority affirms the district court's grant of summary judgment on the apparent theory that [*Hazen Paper*] precludes the use of the disparate impact theory of liability under the ADEA." Pet. App. 10a. Judge Cudahy continued: "I say 'apparent theory' because the majority stops ever so slightly short of announcing this conclusion with perfect clarity. But that is the unmistakable import of the majority['s] approach." *Ibid.*

Geller, *Leftwich* implicitly adopted that analysis as well. *Geller*, 635 F.2d at 1032; *Borden's*, 724 F.2d at 1394; *Leftwich*, 702 F.2d at 690.[2]

Respondent alternatively suggests (Br. in Opp. 7-9) that the split in the circuits will abate because *Hazen Paper* contains a clear "direction from this Court that a disparate impact theory is not available under the Act." But the limited holding in *Hazen Paper* was that "there is no disparate *treatment* under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Hazen Paper Co.* v. *Biggins*, 113 S. Ct. 1701, 1705 (1993) (emphasis added). The Court emphasized in *Hazen Paper* that it was not deciding whether the ADEA prohibits disparate *impact* discrimination. *Id.* at 1706. Accordingly, *Hazen Paper* does not in any way undermine the decisions in *Geller*, *Leftwich*, and *Borden's*.

---

[2] Respondent offers two responses to our textual argument. First, it contends (Br. in Opp. 13-14) that the ADEA's exemption for reasonable factors other than age precludes a disparate impact claim. As explained in our petition, however, that interpretation of the exemption reads the term "reasonable" out of the exemption. The inclusion of that term shows that Congress contemplated that factors other than age that are unreasonable can be challenged on disparate impact grounds. And as the agencies responsible for enforcing the ADEA have long concluded, practices that lack a sufficient business justification are unreasonable. See Pet. 11-12. Respondent also contends (Br. in Opp. 15-17) that the legislative history of the ADEA supports the conclusion that the ADEA does not reach disparate impact discrimination. None of the legislative history cited by petitioner, however, is illuminating on that issue. Certainly, that history cannot override the statutory text upon which we rely.

Moreover, as we pointed out in our petition, the Eighth and the Ninth Circuits have adhered to their holdings that the ADEA prohibits disparate impact discrimination in post-*Hazen Paper* cases. *Houghton* v. *Sipco, Inc.*, 38 F.3d 953, 958-959 (8th Cir. 1994); *EEOC* v. *Local 350, Plumbers & Pipefitters*, 998 F.2d 641, 646, 648 n.2 (9th Cir. 1992, amended 1993). Respondent contends (Br. in Opp. 8) that the courts in *Houghton* and *Local 350* did not have any reason to analyze the issue. In *Houghton*, however, the court remanded for a new trial on plaintiff's disparate impact claim. 38 F.3d at 958-959. If the court had believed that *Hazen Paper* precluded such a claim, it would have entered judgment on that claim for the defendant. And in *Local 350*, the court expressly held that *Hazen Paper* did not foreclose the EEOC from pursuing a disparate impact claim on remand. 998 F.2d at 648 n.2.

3. As we have argued in our petition (Pet. 13-14), review is also warranted here because of the importance of the question presented. If proof of discriminatory motive were required to establish a violation under the ADEA, it would significantly narrow the scope of the protection afforded to older workers. Respondent asserts (Br. in Opp. 9) that the question is not important because disparate impact cases can "readily be converted to disparate treatment cases by proof of motive." That assertion is incorrect. In our petition we have set forth the kind of practices that the EEOC has challenged on a disparate impact theory. See Pet. 14. Those practices rarely are the product of a discriminatory motive.

This case is a good example. As we have described in our petition (Pet. 7), respondent's practice of re-

fusing to permit experienced teachers to compete for positions with salary caps when their experience level would require them to be paid at a higher salary under respondent's salary system has a disparate impact on older workers and lacks a sufficient business justification. But that practice was motivated by an intent to save money, not an intent to exclude older workers from employment. Accordingly, if the ADEA does not prohibit disparate impact discrimination, the practice at issue here and others like it (see Pet. 14) would not be subject to challenge, even when they have a seriously discriminatory effect on older workers' employment opportunities.

4. Respondent argues (Br. in Opp. 10-12) that this case is a poor vehicle for deciding whether the ADEA supports disparate impact liability because there are three other independent grounds supporting the court of appeals' judgment. That argument is unpersuasive.

a. Respondent first argues (Br. in Opp. 10) that the court of appeals' conclusion that 29 U.S.C. 623(a)(2) does not protect applicants for employment provides an alternative ground for affirmance. As we have shown in our petition, however, the plain language of Section 623(a)(2) reaches applicants for employment, and Congress did not intend the difference in language between Section 623(a)(2) and the analogous provision in Title VII to have any substantive significance. See Pet. 12-13; 29 U.S.C. 623(a)(2) (making it unlawful to engage in conduct that would deprive any "individual" of employment opportunities); 118 Cong. Rec. 4943 (1972) (noting that the inclusion of the term "applicants for employment" in the amendment to Title VII was intended to be "declaratory of present law"). Accordingly, we have sought review of the

court of appeals' conclusion that Section 623(a)(2) does not protect applicants for employment.

Respondent argues (Br. in Opp. 10) that this issue is not worthy of review by this Court. But the issue is both closely related to the principal question upon which we have sought review and of considerable independent importance. A paramount purpose of the ADEA is "to promote employment of older persons based on their ability." 29 U.S.C. 621(b). That goal would be seriously compromised if applicants for employment were not protected against disparate impact discrimination.

b. Respondent next contends (Br. in Opp. 10-11) that the practice challenged in this case is protected by 29 U.S.C. 623(f)(2) (1988 & Supp. V 1993), which provides that it is not unlawful "to observe the terms of a bona fide seniority system * * * which is not a subterfuge to evade the purposes of the chapter." As the district court concluded, however, the practice at issue here is not an aspect of respondent's collectively bargained-for seniority system. Pet. App. 27a. Under the express terms of the bargaining agreement, that seniority system governs only the progression of *incumbent* teacher salaries. It does not govern entry level salaries, which are left to the discretion of individual principals. *Ibid.*

Contrary to respondent's contention (Br. in Opp. 11), the court of appeals did not hold that the practice at issue here is protected by 29 U.S.C. 623(f)(2) (1988 & Supp. V 1993). Instead, it relied on Section 623(f)(2) for the limited purpose of supporting its conclusion that respondent's "policy of linking wages to experience is an economically defensible and reasonable means of determining salaries." Pet. App. 9a.

c. Respondent finally contends (Br. in Opp. 11-12) that the practice at issue here is supported by a sufficient business justification to defeat a disparate impact claim under the standard set forth in *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989). Because the lower courts concluded that the ADEA does not prohibit disparate impact discrimination, however, they never reached the question of business justification. Indeed, because the courts granted summary judgment on the threshold question, the EEOC never had an opportunity to litigate the business justification issue. If the Court grants review and reverses on the ground that the ADEA prohibits unjustified disparate impact discrimination, the case would then be remanded for a determination whether there is an adequate business justification for the practice challenged in this case. That issue is not presently ripe for review.

We nonetheless note that respondent is mistaken in its view that the practice at issue here is lawful under *Wards Cove*. Respondent asserts (Br. in Opp. 12) that the practice significantly serves its interest in saving money. Even if that were so, the EEOC can still prevail under a disparate impact theory by showing that another practice without a disparate impact on older workers would serve that interest equally well. *Wards Cove*, 490 U.S. at 660-661. The EEOC can readily make that showing. As we have explained in our petition (Pet. 7), respondent's interest in saving money can be fully satisfied by setting a salary cap on a position and then permitting persons of all experience levels to compete for the

position at a salary no greater than that dictated by the cap.[3]

* * * * *

For the foregoing reasons as well as those stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN P. ROWE
General Counsel (Acting)
Equal Employment
Opportunity Commission

JUNE 1995

---

[3] Respondent contends (Br. in Opp. 12) that the court of appeals' finding that the EEOC failed to prove that respondent's salary system was a pretext for intentional discrimination precludes the EEOC from prevailing on its disparate impact claim. That contention fails to take into account the difference between disparate treatment and disparate impact cases. To demonstrate pretext in a disparate treatment case, a plaintiff must show that an employer's articulated interest is a pretext for intentional discrimination. *St. Mary's Honor Center* v. *Hicks*, 113 S. Ct. 2742, 2747-2748 (1993). To counter a showing of business justification in a disparate impact case, a plaintiff must show that the employer's articulated justification can be served by another practice that does not have a disparate impact. *Wards Cove*, 490 U.S. at 660-661. The court of appeals' finding that the EEOC failed to show that the practice challenged in this case was a pretext for intentional discrimination has no bearing on the question whether the EEOC can establish that respondent's stated interest in saving money can be served by another practice that does not have a disparate impact on older workers.